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In the

Supreme Court of the United States

OCTOBER TERM, 1934

No. 670

TEXAS AND NEW ORLEANS RAILROAD COMPANY ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

Appeal from the United States District Court for the Western District of Missouri, Western Division.

BRIEF ON BEHALF OF APPELLANTS

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In the

Supreme Court of the United States

OCTOBER TERM, 1934

No. 670

TEXAS AND NEW ORLEANS RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; ABILENE & SOUTHERN RAILWAY COMPANY; THE DENISON AND PACIFIC SUBURBAN RAILWAY COMPANY; THE PECOS VALLEY SOUTHERN RAILWAY COMPANY; THE WEATHERFORD, MINERAL WELLS & NORTHWESTERN RAILWAY COMPANY; FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES, THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, DEBTORS; L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, MISSOURI PACIFIC RAILROAD COMPANY, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, AND INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, DEBTORS; J. M. KURN AND JOHN G. LONSDALE, TRUSTEES, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY; FORT WORTH & RIO GRANDE RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; FORT WORTH AND DENVER CITY RAILWAY COMPANY; THE WICHITA VALLEY RAILWAY COMPANY; BURLINGTON-ROCK ISLAND RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY; GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY; PANHANDLE AND SANTA FÉ RAILWAY COMPANY; ROSCOE, SNYDER AND PACIFIC RAILWAY COMPANY; KANSAS, OKLAHOMA & GULF RAILWAY COMPANY; MIDLAND VALLEY RAILROAD COMPANY; FORT SMITH AND WESTERN RAILWAY COMPANY, L. B.

BARRY, JR., RECEIVER; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; TEXARKANA AND FORT SMITH RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; LOUISIANA, ARKANSAS & TEXAS RAILWAY COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; AND THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,

Appellants,

VS.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

Appeal from the United States District Court for the Western District of Missouri, Western Division.

BRIEF ON BEHALF OF APPELLANTS

STATEMENT

1. References to Official Reports of Decisions of the Lower Court and of the Commission

This appeal was timely prosecuted under the Urgent Deficiencies Appropriations Act of October 22, 1913, 38 Stat. 208, 219, 220, Judicial Code, § 238 (28 U. S. C., § 47 and § 345) from a final decree of dismissal entered by a district court of three judges specially constituted pursuant to statute (*ibid.*, 28 U. S. C., § 41 [28] and § 48).

The opinion of the district court has not been published in the printed reports, but will be found at pages 899

to 904 of the printed record herein. The two orders of the Interstate Commerce Commission here assailed were reproduced as Exhibits C and F to the Amended Bill of Complaint (R. 103-10 and 117-18) and a copy of the report upon which such orders were predicated, entitled *Western Horse and Mule Rates*, 195 I. C. C. 417, was attached to said Amended Bill as Exhibit A (R. 63-100).

Certain antecedent cognate reports of said Interstate Commerce Commission, for convenience hereinafter termed the Commission, will be referred to and commented upon as occasion may require in the ensuing portions of this brief. The history of the rate adjustment herein under review logically and naturally separates itself into two distinct periods, and in the subjoined chronological résumé thereof, which is designed to amplify the statement of such proceedings set forth on pages 9-24 of the Amended Bill of Complaint (R. 14-30), we shall present same in that order.

2. Finding of Probable Jurisdiction

With the petition for the allowance of an appeal to this Court, appellants presented a separate statement of the basis upon which an appeal lies to review the decree of the district court, and a finding of probable jurisdiction was noted by this Court on February 11, 1935.

3a. Proceedings Before the Commission (1919-25)

The foregoing report of the Commission in *Western Horse and Mule Rates*, 195 I. C. C. 417, rendered July 24, 1933, was the culmination of a series of independent reports in a group of complaints relating to the interstate rates on carload shipments of horses and mules (except as otherwise specifically noted) between designated points, primarily the market centers, in what may broadly be termed southwestern territory, embracing principally the States of Arkansas, Louisiana, Oklahoma, and Texas, although extending in a measure into the State of Kansas, the southern portion of Missouri, the eastern part of Colorado, and the northeastern corner of New Mexico. In other cases not directly involved in this appeal, as will be more fully explained, the interstate rates on carload shipments of horses and mules between points in the States of South Dakota and Nebraska and market centers in that general territory were likewise put in issue. At the outset, evidence in these respective complaints was received by the Commission upon independent hearings, and for the most part they were at first decided separately, although ultimately they were consolidated by the Commission and a final decision was rendered collectively in *Western Horse and Mule Rates, supra.*

No. 11018, Wichita Board of Commerce et al., Complainants, 60 I. C. C. 536, filed (R. 185) November 15, 1919. By this complaint, which it will be noted was filed

approximately one year after the termination of the World War on November 11, 1918, during the course of which there developed an abnormal and unusually large activity in the marketing and shipment of horses and mules (R. 70, 653), the complainants attacked the carload rates on horses and mules from Wichita, Kans., to points in Arkansas, Louisiana, and Texas, as well as to Memphis, Tenn., and points based thereon. A hearing was held on January 16, 1920 (Exhibit AA*, R. 184), followed by the Commission's report and order (Exhibit AB, R. 175) of March 1, 1921, wherein it was held that the assailed rates were unreasonable to the extent that they exceeded the aggregates-of-intermediate rates and were unduly prejudicial to the extent that they exceeded the rates contemporaneously maintained on like traffic from Kansas City to the same destinations in Arkansas, Louisiana, and Texas, and in so far as they exceeded the rates contemporaneously in effect from Kansas City to Memphis by more than $10.00 per standard car of 36 feet 6 inches, with rates on larger cars in proportion. This complaint was later reopened by order (Exhibit OO, R. 906) entered November 10, 1924, for consolidation with other then pending proceedings.

I. & S. No. 1483, Horses and Mules from Kansas City, Missouri, 69 I. C. C. 97. The carriers defendant in No.

* To avoid confusion thereof with Exhibits A to F appended to the Amended Bill of Complaint and with the numbered exhibits in the record before the Commission, the exhibits filed in the trial court were given a multiple lettering, as AA, BB, etc.

11018 thereupon revised their assailed rates on horses and mules so as to give effect to such findings and order, but upon protest of the Chamber of Commerce of Kansas City, Mo., the rates so published were suspended by the Commission in its Investigation and Suspension Docket No. 1483. Thereupon, after holding a hearing and receiving testimony on March 29, 1922 (Exhibit CC, R. 227), by its report and order (Exhibit AC, R. 175) entered in that proceeding on May 29, 1922, said Commission found that the rates so published did not exceed the limit of reasonableness, but that without corresponding changes in the rates from St. Louis they resulted in undue prejudice to Wichita and Kansas City shippers and in undue preference of St. Louis shippers, and were therefore held to be not justified. Upon petition of the respondents in said Investigation and Suspension Docket No. 1483, the proceeding was reopened for further consideration by order dated July 26, 1922 (Exhibit NN, R. 905-6), and was subsequently consolidated for final disposition with the consolidated proceedings, as hereinafter related.

No. 13001, The Chamber of Commerce of Kansas City, Mo., Complainant, 89 I. C. C. 22. Shortly following the announcement of the Commission's decision in No. 11018, the Chamber of Commerce of Kansas City, Mo., by complaint filed (see 89 I. C. C. 22) July 21, 1921, assailed the carload rates on horses, mules, asses and burros from

Kansas City to points in Texas and Louisiana. Hearing was held in due course on November 28, 1921 (Exhibit BB, R. 210), and in its report and order based thereon (Exhibit MM, R. 172), made and entered April 26, 1924, the Commission found that for the future the assailed rates would be unjust, unreasonable, and unduly prejudicial to the extent they exceeded the scale of rates set forth in the appendix to its said report. The rates so prescribed were never published, for on June 25, 1924 (Exhibit MM, R. 904), the complaint was reopened by the Commissic prior to the effective date of its order, and was likewise thereafter consolidated with the other proceedings.

No. 12358, Texas Livestock Shippers Protective League et al., Complainants, 93 I. C. C. 479, filed (see 195 I. C. C. 418) February 19, 1921. By this complaint the carload rates on horses and mules between Fort Worth, Texas, and points in southwestern territory, as previously defined, were assailed (93 I. C. C. 480), and in due course a hearing was held on January 19-21, 1922 (Exhibit DD, R. 265).

No. 13619, Ross Bros. Horse & Mule Company et al., Complainants, 93 I. C. C. 479, filed February 23, 1922. It was alleged in this complaint (93 I. C. C. 480) that the carload rates on horses and mules between Fort Worth and other specified points were unreasonable, and at a hearing held on May 16, 1922 (Exhibit EE, R. 357),

the complaint was submitted by stipulation upon the record made in No. 12358.

No. 13627, Burnett-Yount Horse & Mule Company et al., Complainants, 93 I. C. C. 479, filed (93 I. C. C. 481) March 4, 1922. The complainants here assailed the carload rates on horses and mules between points in Texas and points in adjacent states, and to east-bank points on the Mississippi River (R. 359), namely, Memphis, Natchez, Vicksburg and New Orleans. At a hearing on July 20, 1922 (Exhibit FF, R. 358), the complaint was submitted by stipulation upon the record made in No. 12358 as supplemented by additional evidence thereupon presented by the respective parties thereto.

Horse and Mule Rates in the Southwest, 1924, 93 I. C. C. 479. Nos. 11018 and 13001, as also I. & S. No. 1483, having each been reopened as aforesaid, following the taking of testimony in Nos. 12358, 13619 and 13627 they were consolidated therewith for final disposition, whereupon by its report and order (Exhibit QQ, R. 173) made and entered in such consolidated proceedings on November 10, 1924, under the title *Horse and Mule Rates in the Southwest, 1924*, the Commission directed and required appellants (or their predecessors in name or title) to establish, maintain, and observe between the three market points of Kansas City, Mo., Wichita, Kans., and Fort Worth, Tex., and points generally in the States of Kansas, Oklahoma, and Arkansas, Texas common-point

territory (approximately the eastern half of the State), that part of Louisiana west of the Mississippi River, that part of Missouri south of the Missouri River, and those parts of Colorado and New Mexico previously described (page 4), the scale of rates* set forth in the appendix to its said report. Except as noted in the following paragraphs, although substantially less than those advocated by them, the rates so prescribed were published by the defendant carriers for general application in the Southwest (R. 65) effective May 20, 1925, and were those in force and effect when the report and orders of the Commission herein assailed were made and entered in 1933, as also at the time this action was pending in 1934 before the court below.

I. & S. No. 2389, Rates on Horses and Mules To, From, and Between Southwestern Points, 102 I. C. C. 87. In its report of November 10, 1924, the Commission stated (93 I. C. C. 490) that the record then before it "is insufficient to warrant us in determining interstate rates to Fort Worth from Texas differential territory and from New Mexico." Accordingly, in publishing the rates that became effective May 20, 1925, the carriers provided for the addition to the rate scales so prescribed of certain arbitraries or differentials in respect of shipments

* These were substantially the commodity 12 scale rates (vide 93 I. C. C. 493) prescribed in **Memphis-Southwestern Investigation**, 77 I. C. C. 473, l.c. 531-32, 548-49, 569-70, 592, 595, to apply on such "dead freight" as bags, potatoes, and soap, and they bore no fixed relation whatever to the rates on cattle or other edible livestock.

between points in Texas differential territory and New Mexico and the primary markets in Texas, Oklahoma, Kansas, and Missouri, but upon protest the rates or arbitraries so published were suspended and made the subject of investigation in Investigation and Suspension Docket No. 2389.

A hearing was thereupon held on May 6 and May 19, 1925 (Exhibit GG, R. 393, 424), and by its report and order based thereon (Exhibit PP, R. 173) of July 30, 1925, the Commission found and held the suspended rates and schedules were not justified but further held that the carriers had justified the reasonableness of a higher level of rates on horses and mules for that portion of the hauls thereof in Texas differential territory and New Mexico than those authorized in the basic southwestern scale, and permitted them to publish for hauls in that portion of the Southwest rates approximately 20 per cent higher than the prescribed basic southwestern scale, which authorized differentials or arbitraries were in due course published and made effective by said carriers, and were those in force and effect when the report and orders of the Commission herein assailed were made and entered in 1933, as also at the time this action was pending in 1934 before the court below.

The Kansas-Missouri Rates. By order entered March 16, 1925 (Exhibit QQ, R. 939-40), upon joint petition of the Public Service Commission of Kansas and The Cham-

ber of Commerce of Kansas City (*vide* 195 I. C. C. 419) the Commission reopened the aforesaid consolidated proceedings for further hearing, but with respect only to "rates from or to points in Kansas, Colorado, and southern Missouri, respectively, to or from Wichita, Kans., Kansas City, St. Joseph and St. Louis, Mo.," whereupon, concurrently with the hearings in I. & S. No. 2389, further hearings were held in the consolidated proceedings before Examiner J. F. Eshelman jointly with the Kansas Public Utilities Commission (R. 65, 484) on May 6-8 and May 15-16, 1925 (Exhibit HH, R. 479, 484). Thereafter, a proposed report was prepared by Examiner Eshelman (Exhibit SS, R. 946-59), in which he recommended that the Commission, because of more favorable transportation conditions there prevailing, prescribe a somewhat lower basis of rates in that section than had been found to be just and reasonable in the Southwest generally (R. 957).

Following the service of this proposed report in November, 1925, exceptions to the findings and recommendations therein contained were filed (Exhibit SS, R. 173) by the complainants in Nos. 11018, 13001, and 12358, the Wichita, Kansas City, and Texas complaints, respectively, as well as by the defendant carriers operating in the affected territory. The Commission never rendered a decision on the Eshelman proposed report, but on January 4, 1926, as recited below, an order was entered reopening all pending cases for further hearing.

No. 12268, Board of Railroad Commissioners of the State of South Dakota, Complainant, 77 I. C. C. 451. This case, which was decided February 13, 1932, involved the lawfulness of the rates and the minimum weights applicable to the transportation of ordinary livestock, in carloads, from points in South Dakota to market and intermediate points in Minnesota, Wisconsin, Illinois, Iowa, Missouri, and Nebraska. The evidence (Exhibit II, R. 590) dealt principally with the issues relating to the rates on edible livestock, but in its report the Commission found (page 461) that the rates on horses and mules should be 115 per cent of the rates prescribed to apply on cattle for like hauls.

No. 13273, The Nebraska case, 89 I. C. C. 444. This proceeding, which was decided April 15, 1924, was instituted by the Commission on its own motion (89 I. C. C. 445) "to determine whether the proper relationship existed between the interstate and intrastate rates on ordinary livestock, in carloads, from all Nebraska points to Omaha and South Omaha, on the one hand, and the interstate rates from the same points of origin to St. Joseph and Kansas City, Mo., and Sioux City, Iowa, on the other, with a view to prescribing such rates as would remove any undue prejudice, unreasonable preference, or unjust discrimination against interstate commerce, as might be found to exist." Again, following a hearing (Exhibit JJ, R. 592) participated in by a member of the

Nebraska State Railway Commission (89 I. C. C. 445), the rates on horses and mules were here merely incidental to those on edible livestock and, while the 115 per cent relation of the rates on horses and mules to those on cattle was established, as in the *South Dakota case*, the Commission specifically stated in its report (page 458) that the rates therein prescribed "are not suggested as reasonable maxima."

It will be noted that the horse and mule rates under review both in the *South Dakota case* and in the *Nebraska case* may well be said to be wholly distinct from the rates on horses and mules before the Commission in the southwestern cases, the former scarcely more than touching the northern fringe of the territory in which the latter have application.

3b. Proceedings Before the Commission (1926-33)

Such was the status of the assailed rate adjustment before the Commission at the end of the year 1925. After having made three abortive and ineffectual attempts in 1921, 1922 and the early part of 1924 (60 I. C. C. 536; 69 I. C. C. 97; 89 I. C. C. 22) to devise within "the flexible limit of judgment" inhering in it a basis of reasonable maximum rates on horses and mules to apply in southwestern territory, none of which corresponded with the others, the Commission finally on November 10, 1924, prescribed (93 I. C. C. 479) dual basic scales of single-

line and joint-line mileage rates on horses and mules to apply between the points within the scope of the issues developed by the evidence before it,* and on July 30, 1925, the carriers were authorized (102 I. C. C. 87) to establish 20 per cent higher differentials or arbitraries for that portion of the hauls occurring in Texas differential territory and New Mexico.

The only protest made against the rates so prescribed and authorized was that of the Public Service Commission of Kansas and The Chamber of Commerce of Kansas City, which was limited to the "rates from or to points in Kansas, Colorado and southern Missouri, respectively, to or from Wichita, Kans., Kansas City, St. Joseph, and St. Louis, Mo.," and we have seen that in due course such prescribed and authorized rates were otherwise established and made effective in 1925. True, the complainants in the Texas cases (Nos. 12358, 13619, and 13627) filed three petitions for reconsideration and/or rehearing (Exhibits QQ and RR, R. 173), but in none of them was any attack made upon the reasonableness or propriety otherwise of the rates so published.

* "Although the allegations are sweeping in their extent, the evidence was confined principally to the rates between Fort Worth and points in Louisiana, Arkansas, Oklahoma, Missouri, Kansas, Colorado and New Mexico." See 93 I. C. C. 479, l.c. 481, at middle of page.

In one of these petitions (R. 907-9), dated December 23, 1924, the Commission was asked by those complainants to reopen the cases for the purpose of receiving evidence as to the paying and bearing of the freight charges* pursuant to the suggestion and authorization on page 495 of its report (93 I. C. C. 479) of November 10, 1924. They later filed a motion for rehearing (R. 911-19) dated January 9, 1925, but the sole complaint urged therein was with respect to the holding of the Commission that reparation would be awarded only to the extent that the assailed through rates exceeded the combination of applicable intermediate rates. Their third petition (R. 941-46) was dated June 27, 1928, and simply asked that the Commission modify or revise in certain respects its prior orders relating to the reparation feature, but even then no complaint was urged as to the rates that had been prescribed for future observance and which were then in force and effect within southwestern territory.

Thus, it was only when the proposed report of Examiner Eshelman was prepared and served late in 1925 that the Texas complainants manifested any dissatisfaction

* This petition was granted by order (Exhibit QQ, R. 910) dated January 12, 1925, and a separate report (139 I. C. C. 448) dealing solely with the subject of an award of reparation to additional complainants was rendered, which, however, has no bearing upon the issues herein under review.

with the rates and differentials that had been respectively prescribed and authorized in the 1924 and 1925 reports of the Commission (93 I. C. C. 476; 102 I. C. C. 87), and even then such dissatisfaction was expressed, not by means of a petition for reconsideration or the like, but only in the form of exceptions to the recommendation of Examiner Eshelman that a somewhat lower level of rates on horses and mules be prescribed in what is in reality the southern part of western trunk-line territory than that which the Commission had previously fixed as just and reasonable for application to, from, and between points in the Southwest proper.* This feature is pointedly commented upon in the dissent of Commissioner Porter (R. 96).

None the less, despite this general absence of audible objection to the reasonableness *per se* of the prescribed southwestern rates, by order (Exhibit TT, R. 960-61), entered January 4, 1926, the Commission on its own motion reopened for further hearing the entire group of cases relating to the rates on horses and mules in the Southwest, including Texas differential territory and New Mexico (in part), and likewise, by a corresponding order of the same date (Exhibit UU, R. 963), the Com-

* Indeed, the Texas complainants (who are representative of the only truly southwestern shippers before the Commission) have taken no active interest in these proceedings since the last oral argument was had before the Commission (February 17, 1930, R. 1039). Neither they nor the Wichita complainants were represented at the 1932 hearing (Exhibit KK, R. 824), nor have they or any other complainant elected to file an intervention in this cause in support of the Commission's orders.

mission additionally reopened on its own motion for further hearing* the *South Dakota case* and the *Ne-*

* The ex parte action of the Commission in reopening these cases (imposing upon the parties thereto the expense of again undertaking to justify the involved rates) was bitterly assailed by the shipper interests represented at the further hearings held therein. Mr. D. L. Kelley, a witness for the Board of Railroad Commissioners of South Dakota, was especially caustic in his remarks, which were in part as follows:

> "* * * We have no complaint in the case. * * * This is primarily a southwestern case. * * * We have been dragged in here by the hair. There is no complaint from us. There is no demand from the South Dakota or western trunk-line railroads for a change in the South Dakota rates." (R. 773.)
>
> "We have no competition with the Southwest. We don't care what your rates are. We think we shouldn't have been dragged into the case, but since we are here we want to defend our rates." (R. 786; cf. R. 802.)

Mr. J. H. Tedrow, Transportation Commissioner of the Kansas City Chamber of Commerce, testified in part thus:

> The only interest that the complainants in Docket 13001 have in this proceeding is to be left alone. That is to say, this general stirring up of the rates on horses in this territory is not of our seeking. * * * I want to call attention to the fact that the people or the interests that have been responsible in opening this whole proceeding and spreading it before the Commission are not represented at this further hearing.". (R. 803.)

Mr. C. A. Ross, witness for the Nebraska State Railway Commission, commented on this point as follows:

> "I think that is all I have to offer, except that I do think that the complainants in this case, the Texas Livestock Shippers Protective League, should be here at this time. They have attacked our rates; and, in view of the fact that they are not here, I can't help but feel that the complaint should be dismissed. We were forced into this proposition, and there is no one here to take the shippers' side. I am not here to take the shippers' side in so far as the Texas people are concerned. I am here to try and maintain our level of rates." (R. 824.)

Nevertheless, by its 1933 decision the Commission authorized substantial increases of the rates on horses and mules previously prescribed in the South Dakota and Nebraska cases, while at the same time requiring that the southwestern rates be reduced.

braska case, but in so far only as the rates on horses and mules were brought in issue therein.

Thereafter, by order (Exhibit TT, R. 962) of February 6, 1928, the scope of the further hearing was restricted to a consideration of rates for the future, but such further hearing was not in fact held (R. 596) until in October, 1928, almost three years after the orders reopening the cases were entered. Upon the record available in consequence of such further hearing a proposed report by Examiner R. S. Simons (Exhibit VV, R. 965-1038) was prepared and served in November, 1929, to which exceptions on behalf of the southwestern carriers (Exhibit VV, R. 173) were filed on December 16, 1929; and oral argument before the Commission was thereupon had (Exhibit VV, R. 1039) on February 17, 1930.

No further decision of the Commission was immediately forthcoming, but the proceedings were held in abeyance until January, 1932, when the decision of this Court was rendered in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, wherein the Commission's orders in the so-called *Western Grain case* were set aside, *inter alia*, because of its failure to grant a petition of the carriers for reconsideration grounded in part upon the changed economic conditions that had taken place since the record before the Commission was closed.

Thereupon, by order (Exhibit VV, R. 1040-41) dated February 1, 1932, the Commission on its own motion re-

opened the consolidated proceedings for still further hearing "for the purpose of supplementing the record already made." Such further hearing was in due course held in May of that year, and again it was not until more than a year later that the Commission announced any further action in these cases. On July 24, 1933, however, it rendered its report on further hearing (Exhibit A to Amended Bill, R. 63-100), 195 I. C. C. 417, wherein for the first time it undertook (with Commissioners Aitchison, Porter and Mahaffie dissenting and Commissioner Miller not participating) to fix the rates on horses and mules in southwestern territory on an arbitrary fixed relation of 115 per cent of the corresponding rates on fat cattle previously prescribed, that basis having been rejected so far as the southwestern rates were concerned in its prior report of November 10, 1924, although specifically urged upon it by the complainants, 93 I. C. C. 479, l. c. 482, 487.

In its report on further hearing of July 24, 1933, service of which was effected (R. 964) on August 5, 1933, no accompanying order requiring the establishment of rates in conformity with the revised findings therein was entered, but the Commission announced on page 449 (R. 95) that "defendants will be expected to establish such rates within 90 days after the service of this report," adding that otherwise "we will consider the entry of appropriate orders." On the same date, how-

ever, the Commission entered its Fourth Section Order No. 11340* (Exhibit F to Amended Bill, R. 117-18), whereby its prior orders granting fourth-section relief to permit the operation of the southwestern rates on horses and mules previously prescribed on November 10, 1924, and July 30, 1925, were vacated and set aside, effective February 5, 1934.

Instead of voluntarily revising their rates on horses and mules in keeping with the foregoing admonitory suggestion of the Commission, the southwestern carriers (appellants herein) filed with the Commission their petition for reconsideration and modification of the findings and conclusions in its report on further hearing of July 24, 1933, and for further hearing (Exhibit XX, R. 1045-80), such petition being dated November 6, 1933. An answer thereto was filed by the Chamber of Commerce of Kansas City, Missouri (Exhibit XX, R. 1044, 1081-82), on November 23, 1933, whereupon, on December 26, 1933 (R. 1044), appellants filed with the Commission their motion to delete certain

* Since, as previously noted, the rates on horses and mules within the Southwest were only partially subjected to the Commission's jurisdiction, under the issues within the scope of the consolidated proceedings, it is maintained by appellants that the sole purpose of this withdrawal of previously granted fourth-section relief was to compel them by coercive pressure improperly brought to bear in that manner to accept and give effect to the prescribed percentage relation of the horse and mule rates to the fat cattle rates in the absence of a formal rate order under § 1 such as was thereafter entered.

unwarranted statements embodied in said answer (Exhibit XX, R. 1083-86), but no order was entered on this motion (R. 1044). By order dated December 11, 1933 (Exhibit B to Amended Bill, R. 101-2), though not served upon appellants until December 27, 1933 (Exhibit XX, R. 1044), "Upon further consideration of the records in these proceedings and consideration of the petition of southwestern carriers for reconsideration, modification of findings, and further hearing, and of answers thereto filed by the Board of Railroad Commissioners of the State of South Dakota and the Kansas City Chamber of Commerce," such petition was denied.

On the same date, December 11, 1933, the Commission entered the rate order herein under attack (Exhibit C to Amended Bill, R. 103-10), whereby the defendant carriers were required to establish, on or before March 8, 1934, upon thirty days' notice, rates on horses and mules, in carloads, to, from, and between points within the scope of the consolidated proceedings, "which shall not exceed 115 per cent of the rates on fat cattle from and to the same points" prescribed in *Livestock-Western District Rates*, 176 I. C. C. 1, 179 I. C. C. 104, and 190 I. C. C. 611, from and to the same points, as directed in its aforesaid report on further hearing in

Western Horse and Mule Rates of July 24, 1933.* Consequent upon the institution of this action in the lower court the Commission postponed from time to time (R. 1042-43, 1086-89, 165) the effective date of its aforesaid Fourth Section Order No. 11340 of July 24, 1933, and of its above-described rate order of December 11, 1933, so that such orders did not become effective until August 1, 1934, following the entry by the lower court of its decree of dismissal from which this appeal was prosecuted.

4. Proceedings in the Lower Court

On February 2, 1934, appellants brought this action against the United States in the United States District Court for the Western Division of the Western District

* To afford the Court a better appreciation of the extent of the reductions of the rates on horses and mules in the Southwest thus directed by the Commission we reproduce below (see also pages 27-28 of appellant's petition for reconsideration and rehearing.—R. 1063-64) a tabular statement taken from page 3 of Part 1 of Southwestern Lines' Exceptions to the proposed report of Examiner Simons (Exhibit VV, R. 1032), wherein he qualifiedly recommended that the Commission, as it did in its 1933 report, require the carriers to establish rates on horses and mules between the points involved in the consolidated proceedings which would not exceed the fat cattle rates prescribed to apply in the Southwest by more than 15 percent:

Distance	Southwestern Horse and Mule Scale		Examiner's Proposed	Reduction	
(Miles)	Single	Joint	Scale	Single	Joint
100	24c	27c	23c	1c	4c
200	35c	38c	31c	4c	7c
300	44c	46c	37c	7c	13c
500	56c	57c	48.5c	7.5c	8.5c
750	68c	68c	60c	8c	8c
1000	78c	78c	71.5c	6.5c	6.5c

of Missouri, at Kansas City, to enjoin, set aside, and annul the two orders of the Commission previously referred to, but not in so far as same related to the rates involved in causes Nos. 12268 and 13273, the *South Dakota* and *Nebraska cases* (R. 60, 1093), and on March 12, 1934, appellants filed their Amended Bill of Complaint (R. 3-118), on which the cause proceeded to trial. The jurisdiction and venue of the trial court (R. 14) resulted from the fact that the complainant in one of the complaints in the consolidated proceedings wherein the assailed orders of the Commission were entered (No. 13001, the *Chamber of Commerce of Kansas City, Mo.*, v. *Alexandria & Western Railway Company et al.)* has its domicile at Kansas City, Mo.

In their Amended Bill appellants asserted the invalidity of said orders of the Commission on the grounds, *inter alia*, that they were based upon a mistake of law and upon an erroneous conception by the Commission of its powers, that the Commission sought to coerce the carriers by an illegal use of its authority, that the rates prescribed by the Commission in its assailed rate order are without due regard for the transportation standard and were founded upon evidence not legally before the Commission, that the Commission deliberately rejected and declined to accord weight to relevant evidence before it, that such rate order was unsupported by basic findings essential to its validity and that besides there is no

factual basis in the evidence to support such jurisdictional findings, that certain findings were not only unsupported by but were contrary to the evidence of record, that the Commission arbitrarily and capriciously refused to grant appellants a rehearing sought in part for the purpose of showing a pronounced upward price trend and consequent improvement of the economic situation in respect of the horse and mule industry and the continued financial difficulties of the carriers, and that such assailed rate order is defective and void in that it does not conform to all statutory requirements. The statutory provisions which are believed to be pertinent are reproduced in Appendix A hereto.

The answers of both the United States (R. 119-21) and the Interstate Commerce Commission (R. 121-24), intervening defendant, to the Amended Bill were filed on March 24, 1934. Neither of such defendants elected to file a motion to dismiss, and on that date the cause proceeded to trial before a specially constituted court of three judges, to wit, Circuit Judge Arba S. Van Valkenburgh and District Judges Merrill E. Otis and Albert L. Reeves, organized pursuant to the requirements of the Urgent Deficiencies Appropriations Act of October 22, 1913, *supra*. A certified copy of all the evidence before the Commission, Exhibits AA to LL (R. 172, 184-893, 1134-1213), together with numerous other docu-

ments* (R. 172-84, 904-1124) were submitted, and the cause was thereupon taken under advisement upon oral argument and briefs, resulting in the entry by the court below of a final decree of dismissal (R. 124-27) on June 7, 1934, accompanied by a per curiam opinion (R. 899-904) and the following findings of fact and conclusions of law (R. 904):

Findings of Fact

The Court finds the Interstate Commerce Commission made the order complained against in plaintiffs' bill after full, adequate and complete investigation of all the facts; and that such orders were not arbitrary, capricious, nor unreasonable, but, on the contrary such orders were made with due deference and regard to the law, and that same were supported by the evidence.

Conclusions of Law

The Court, therefore, concludes that the plaintiffs are not entitled to the relief prayed, and that application for a final injunction should be denied.

Appellants thereupon presented to the trial court their request for detailed findings of fact and conclusions of

* Among these documents appellants have included (but not in the printed record) a copy of the briefs and exceptions filed by them with the Commission, which readily disclose the diligence with which they opposed the reduction of their rates on horses and mules.

law (R. 125-48), which request was denied (R. 149), whereupon they filed their assignment of errors and petition and bond for appeal, and otherwise duly perfected their appeal (R. 149-64, 167-71). Contemporaneously therewith, appellants additionally presented to the trial court* their petition for a stay of the orders of the Interstate Commerce Commission pending the appeal hereof to the Supreme Court (R. 164-67), which petition was likewise denied (R. 167). Accordingly, appellants were compelled to revise their rates on horses and mules in the Southwest on the lower basis prescribed by the assailed orders of the Commission, which became effective (R. 165), as previously stated, on August 1, 1934.

SPECIFICATION OF ERRORS†

The errors herein urged by appellants, which they have undertaken to summarize in the statement of points upon which they intend to rely (R. 1124-30) filed in conformity with Rule 13, are those assigned in the court below (R. 151-62). They here follow:

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* A similar petition for stay was presented by counsel for appellants to Mr. Justice Roberts of this Court on July 14, 1934, Mr. Justice Butler being abroad at the time, but he, too, declined to enter such stay order.

† The errors upon which appellants principally rely are embodied in Assignments Nos. 1 to 23 and 57 to 60, inclusive, Assignments Nos. 24 to 56, inclusive, which deal exclusively with the denial by the court below of their requested findings of fact, being urged primarily through an abundance of precaution. To the extent the latter may be considered superflous they may be disregarded.

Principal Errors

1. The District Court erred in entering its final decree of dismissal on June 7, 1934, and in refusing to grant the relief prayed for by petitioners in their bill of complaint herein and in dismissing said bill of complaint.

2. The District Court erred in failing and refusing to hold that the entry by the Interstate Commerce Commission of its Fourth Section Order No. 11340 entered on July 24, 1933, coevally with the rendition of its report of that date in *Western Horse & Mule Rates*, I. C. C. Docket No. 12358 and consolidated causes, including Fourth Section Application Nos. 461, 462, 621, 673, and 678, constituted an arbitrary, unreasonable, unlawful, unjust, void and wholly unnecessary exercise, as well as a misuse, of the statutory powers conferred upon said Commission, in that it represented an effort on its part to coerce the defendant carriers (appellants herein) by means of the withdrawal of fourth-section relief into accepting reductions of their rates (previously prescribed) and in yielding compliance with the findings and conclusions set out in its said concommitent report in *Western Horse & Mule Rates* to a greater extent than was possible within the issues raised in said consolidated causes under and pursuant to other provisions of the statute.

3. The District Court erred in failing and refusing to hold that the order made and entered by the Interstate

Commerce Commission in that certain proceeding then pending before it entitled *Western Horse & Mule Rates*, I. C. C. Docket No. 12358 and consolidated causes, on the 11th day of December, 1933, was arbitrary, unreasonable, unlawful, unjust, void, and useless, in that such order was made without substantial evidence to support it, that the findings upon which it was based were contrary to and contradicted by the evidence of record, and that in other respects it was an attempted illegal use of its authority and an abuse of the statutory powers conferred upon it.

4. The District Court erred in failing and refusing to hold that the aforesaid orders of said Commission set out in the bill of complaint herein, and sought to be annulled and set aside are unsupported by and contrary to the evidence and are hence invalid.

5. The District Court erred in failing and refusing to hold that the aforesaid orders of said Commission set forth in the bill of complaint herein, and sought to be annulled and set aside, were without substantial evidence to support same and are beyond the powers of the Commission to make.

6. The District Court erred in failing and refusing to hold the aforesaid orders of the Commission void and useless because the Commission had exceeded its statutory powers, because it had arbitrarily and capriciously refused to exercise the powers, functions, and duties con-

ferred and imposed upon it by the statute by refusing and declining to consider relevant evidence of record, and because its action was otherwise manifestly arbitrary and unreasonable and transcended the authority conferred upon it by law, wherefore said orders should be set aside and annulled by the Court.

7. The District Court erred in failing and refusing to hold that in making the findings and conclusions expressed in its report in said *Western Horse & Mule Rates* of July 24, 1933, said Commission did not conform such findings and conclusions to the transportation standard, but on the contrary arbitrarily and capriciously rejected and refused to consider relevant evidence of record before it which, if taken into consideration and accorded the weight to which it was legally entitled, would have conclusively demonstrated and required a finding by said Commission that the presently effective rates on horses and mules within the territory embraced in the several complaints and other causes involved herein (broadly speaking, so-called southwestern territory, including roughly, the States of Arkansas, Louisiana, Oklahoma, and Texas, as well as parts of New Mexico, Colorado, Kansas and Missouri) are not and for the future will not be in excess of reasonable maximum rates, and that in consequence the orders of said Commission based upon findings so wanting in conformity to the transportation standard and herein assailed are arbitrary, unlawful, void, and useless.

8. The District Court erred in failing and refusing petitioners' requested conclusion of law that the rates on fat cattle and other edible livestock prescribed by said Commission in a certain proceeding entitled *Livestock-Western District Rates*, which were declared in its reports rendered therein on June 8, 1931, 176 I. C. C. 1, and on January 10, 1933, 190 I. C. C. 611, to be based primarily upon the economic distress of the [edible] livestock industry and with the least possible regard to the transportation conditions incident to the handling of that traffic; that in ordering and requiring petitioners to publish and maintain rates on horses and mules in southwestern territory (as described above) which should not exceed by law more than 15 per cent the corresponding rates prescribed in said *Livestock-Western District Rates* to apply on fat cattle the Commission made no finding, nor was there any evidence before it to support such a finding, that the production and marketing of horses and mules in southwestern territory is or has been subject to the same or like economic conditions as those affecting the edible livestock industry, although an affirmative finding was made by said Commission that the volume of movement of horses and mules in southwestern territory is only 3 to 4 per cent of that of edible livestock, and in addition there is affirmative evidence of record that horses and mules are not shipped in trainload lots as is often the case with edible livestock, that being one of the reasons prominently assigned by

said Commission as justifying the legality of the rates so prescribed by it to apply on fat cattle and other edible livestock; that the economic and transportation conditions by which the Commission declared the rates prescribed to apply as reasonable maxima on fat cattle and other edible livestock were principally controlled are non-existent in the case of the horse and mule traffic, and that the Commission made no pretense in its report in said Western Horse & Mule Rates that the aforesaid differences in economic and transportation conditions were taken into account or considered by it in fixing the prescribed rates on horses and mules herein assailed, and that in consequence said finding of the Commission that the rates on horses and mules in southwestern territory should not exceed by more than 15 per cent the rates prescribed by it to apply on fat cattle in that territory, as likewise its subsequently assailed order based upon that finding, are not supported by substantial evidence and hence are arbitrary, illegal, and void.

9. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that, in undertaking to prohibit petitioners from maintaining and applying carload rates on horses and mules in southwestern territory (as described above) which exceed by more than 15 per cent the rates theretofore prescribed to apply on fat cattle in that territory in a wholly different proceeding, and upon a radically different showing of

economic and transportation conditions affecting the traffic, the Interstate Commerce Commission has unlawfully based its assailed order upon evidence not legally before it in the cases wherein such orders were entered, and that such orders are therefore arbitrary, illegal, and void.

10. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that, in basing its order prohibiting petitioners from maintaining and applying carload rates on horses and mules in southwestern territory more than 15 per cent in excess of the rates theretofore prescribed in another proceeding to apply in that territory on fat cattle merely upon a finding that the only substantial transportation disadvantages of horses and mules as compared with other forms of ordinary livestock are a higher percentage of claims for loss and damage and a higher per car valuation when it affirmatively appears from the findings of the Commission that the rates so prescribed on fat cattle were made with the least possible regard for or consideration of transportation conditions, but were based primarily upon the economic distress of the industry and upon the great volume of movement of the cattle traffic in the western district, including the fact that to a considerable extent the shipments are made in trainload lots, none of which circumstances has application to the transportation of horses and mules, the Com-

mission exceeded its lawful authority, and that the assailed orders so entered by it are arbitrary, illegal, and void.

11. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of that to the effect that the prescribing by said Commission in the South Dakota and Nebraska cases of rates on horses and mules no more than 15 per cent in excess of those on fat cattle affords no lawful predicate for a similar requirement concerning the rates on those commodities in southwestern territory, in view of the affirmative evidence and finding that there is no definite relation between the rates in southwestern territory and those involved in the South Dakota and Nebraska cases and that there is little or no active competition in the markets as to horses and mules shipped between points in southwestern territory and those shipped between points in the territory involved in the South Dakota and Nebraska cases.

12. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the Commission exceeded its lawful authority and abdicated its statutory duty in condemning the reasonableness of the existing carload rates on horses and mules in southwestern territory because of rate disadvantages and inequalities brought about by the existence of lower intrastate carload rates on that commodity in Kansas, which intrastate rates and those prevailing in the adjoining

States of Nebraska and Missouri were declared by the Commission to be subnormal, as well as by the existence of lower interstate carload rates on such traffic in that section, especially in view of its further finding that the effect of its assailed order will be to bring about increases in the rates from, to, and between points in the western trunk-line states, including South Dakota, Nebraska and Kansas.

13. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the assailed orders of the Commission are illegal and invalid because they are based in part upon the unwarranted finding that only the better grades of horses and mules find their way to the stock markets, which finding is contradicted by affirmative evidence of record and is without support otherwise.

14. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the assailed orders of the Commission are invalid and illegal because they result in part from the unlawful refusal of the Commission to perform its statutory function and duty to give consideration to relevant rate comparisons presented by the carriers (petitioners herein) to justify the reasonableness of their assailed rates on horses and mules, the action of the Commission in rejecting such evidence being unlawful, especially as the carriers perform more expensive service in the transportation of

horses and mules than in handling the traffic which yields them the greater revenue, distance considered.

15. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the Commission unlawfully and arbitrarily refused to consider the rates on live poultry prescribed by it which were exhibited and relief upon by the carriers (petitioners herein) to justify the assailed rates on horses and mules, there being but scant difference between the transportation conditions incident to the two commodities.

16. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that, without any evidence or finding of the existence of a substantial similarity of transportation conditions in the Southwest and in western trunk-line territory, and without pointing to any special conditions to justify the same level of rates on horses and mules in the two rate groups as it sought to do with respect to edible livestock in *Livestock-Western District Rates*, the action of the Commission in denying the southwestern carriers (petitioners herein) the right to maintain a higher level of rates on horses and mules than those fixed as reasonable and proper in the normally lower rated western trunk-line territory was arbitrary and illegal, and the Commission exceeded its lawful authority in ordering petitioners to reduce their carload rates on horses and mules to the

level of those concurrently prescribed as just and reasonable in western trunk-line territory.

17. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that, there being no evidence or finding that since 1925 there has been a relatively greater improvement in transportation conditions in Texas differential territory and in New Mexico than in Texas common-point territory and the remainder of the Southwest, or that the transportation conditions are now as favorable in one section as in the other, and the evidence of record affirmatively establishing that the contrary is true, the action of the Commission in ordering that the differentials previously authorized by it in 1925 in its Investigation & Suspension Docket No. 2389 be discontinued and abolished is arbitrary, unreasonable, and void.

18. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the action of the Commission in denying the petition of the southwestern carriers (petitioners herein) for reconsideration and further hearing dated November 6, 1933, and in refusing to reopen the complaints to receive evidence showing that a portentous reversal of economic conditions with respect to horses and mules, including a phenomenal upturn in value and demand therefor had occurred during that year was arbitrary and unreasonable.

19. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the action of the Commission in denying said petition for reconsideration and further hearing, and in refusing to afford the southwestern carriers (petitioners herein) an opportunity to prove that during the year 1933 the earnings and financial condition of the carriers in practically all other portions of the United States had shown a greater improvement than in the Southwest, was arbitrary and illegal.

20. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the history of the proceedings before the Commission in the involved cases relating to the rates on horses and mules discloses a fixed determination and set purpose on its part from the date of its order reopening such proceedings for further hearing and consideration of January 4, 1926, to prohibit the southwestern carriers (petitioners herein) from maintaining carload rates on horses and mules more than 15 per cent in excess of the corresponding carload rates on beef cattle without regard to the facts, and solely to facilitate that purpose the Commission at the same time arbitrarily reopened without complaint the South Dakota and Nebraska cases, in which such 115 per cent relationship of the rates on horses and mules to those on beef cattle had been prescribed, whereas it had been previously rejected as to

the rates in southwestern territory, and thereafter otherwise charted a course having that specified end in view, arbitrarily disregarding, ignoring, and refusing to consider all evidence not in consonance therewith.

21. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the action of the Commission in vacating by its Fourth Section Order No. 11340 of July 24, 1933, the fourth-section relief theretofore granted by its Fourth Section Orders Nos. 9059 and 9183 was arbitrary and void, and that the sole purpose thereof was to coerce the southwestern carriers (petitioners herein) into reducing generally their carload rates on horses and mules throughout the Southwest, it not having been within the power of the Commission under the scope of the issues before it in the various cases under review to compel such general reduction by means of an appropriate rate order entered pursuant to the authority otherwise conferred upon it.

22. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that, having taken over the function of prescribing maximum reasonable carload rates on horses and mules in southwestern territory, the statutory obligation and duty rested upon the Commission to see that the rates so prescribed by it did not contravene the provisions of any section of the statute, including those of the fourth section, the evidence of record before the Court disclosing

that without appropriate fourth-section relief it will be impossible for petitioners to apply the rates prescribed by the Commission in its order of December 11, 1933, without creating preferences and prejudices prohibited by section 3 and without compelling them in many instances to publish lower rates than the rates thereby authorized as reasonable maxima and so depriving them of their long hauls and of the full-measure of the earnings which they are entitled to receive under the provisions of sections 15 and 15a.

23. The District Court erred in failing and refusing to adopt petitioners' requested conclusion of law that the order entered by the Commission on February 3, 1934, whereby it purports to grant fourth-section relief "until the effective date of the order to be entered pursuant to a report in Fourth Section Applications Nos. 15445 (amended) and 15473," does not fulfill the duty imposed upon it by the statute, as the petitioners still rest under the onerous burden and obligation in conformity with the Rules of the Commission of justifying permanent fourth-section relief in respect of the rates so prescribed.

57. The District Court erred in its finding of fact that the Interstate Commerce Commission made the orders complained of in the bill of complaint herein after full, adequate and complete investigation of all the facts, and that such orders were not arbitrary, capricious, nor

unreasonable, but on the contrary, they were made with due deference and regard to the law and were supported by the evidence.

58. The District Court erred in its conclusion of law that petitioners are not entitled to the relief prayed for and that their application for a permanent injunction should be denied.

59. The District Court erred in refusing to adopt the findings of fact and conclusions of law prepared and submitted by petitioners.

60. The District Court erred in denying petitioners the relief for which they prayed and in not setting aside and holding void and useless the orders of the Interstate Commerce Commission assailed in this proceeding.

Subordinate Errors

24. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 1. [R. 125.]

25. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 2. [R. 125.]

26. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 3. [R. 126.]

27. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 4. [R. 127.]

28. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 5. [R. 127.]

29. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 6. [R. 128.]

30. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 7. [R. 128.]

31. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 8. [R. 129.]

32. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 9. [R. 130.]

33. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 10. [R. 131.]

34. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 11. [R. 131.]

35. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 12. [R. 132.]

36. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 13. [R. 132.]

37. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 14. [R. 133.]

38. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 15. [R. 133.]

39. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 16. [R. 134.]

40. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 17. [R. 135.]

41. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 18. [R. 136.]

42. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 19. [R. 137.]

43. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 20. [R. 137.]

44. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 21. [R. 137.]

45. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 22. [R. 138.]

46. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 23. [R. 138.]

47. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 24. [R. 139.]

48. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact. No. 25. [R. 139:]

49. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 26. [R. 139.]

50. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 27. [R. 140.]

51. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 28. [R. 140.]

52. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 29. [R. 141.]

53. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact. No. 30. [R. 141.]

54. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 31. [R. 142.]

55. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 32. [R. 142.]

56. The District Court erred in failing and refusing to adopt petitioners' requested Finding of Fact No. 33. [R. 143.]

(Note:—To avoid unnecessarily encumbering the record, appellants have deemed it unnecessary to set out in full their requested findings of fact listed above.)

The Controlling Principles of Law Summarized

A. The Commission's deliberate rejection of relevant and material evidence before it constituted a capricious and flagrant abuse of its discretionary authority and was tantamount to an abdication of its statutory functions and duties.

B. The assailed rate order is unsupported by basic findings essential to its validity.

C. Neither was there a factual basis in the evidence before the Commission to support such essential jurisdictional findings.

D. The rates herein assailed were prescribed without due regard for the transportation standard.

E. The rates previously prescribed on fat cattle having been avowedly based primarily upon the economic distress of the industry and with scant regard for the transportation standard, they afford no lawful criteria by which to measure the reasonableness of rates on other commodities not subject to like economic distress, and in particular horses and mules.

F. The assailed rate order was based upon evidence not legally before the Commission in the cases in which such order was entered.

G. Certain factual findings of the Commission upon which its assailed orders were based are contrary to and contradicted by the evidence.

H. Certain of the factual findings are internally contradictory and conflicting.

I. The assailed orders of the Commission are based upon a mistake of law and upon a consequential misuse of the authority conferred upon it by statute.

J. The refusal of the Commission to grant appellants a rehearing on the ground of a pronounced upturn of economic conditions in the horse and mule industry and of their weakened financial integrity was arbitrary and illegal.

K. The assailed rate order fails to conform to all statutory requirements, and in particular offends § § 4 and 15 of the Interstate Commerce Act.

Fundamentally, the questions which the Court is herein called upon to decide are matters of law and not of fact, since they are based upon averments to the effect that the findings and conclusions upon which the Commission's assailed orders were predicated are not supported by substantial evidence, that its report is wanting in jurisdictional findings sufficient to support its assailed orders, and that in addition the Commission erred in its interpretation and application of the relevant statutory provisions and requirements and in its rejection of and refusal to accord weight to relevant and material evidence of record before it. Stated otherwise, there is involved in this appeal no issue which brings into question the administrative discretion of the Commission, nor is the Court expected to pass upon the weight of the evidence before the Commission nor to substitute its judgment for that of the Commission as to the expediency or wisdom of its contested orders.

BRIEF OF ARGUMENT

Point I

The assailed finding of the Interstate Commerce Comsion, together with the orders based thereon, whereby the previously prescribed rates on carload shipments of horses and mules between points involved in the scope of the proceedings herein under review were condemned as being unjust and unreasonable, was predicated upon a mistake of law, was arbitrarily made without due regard to the transportation standard and without adequate supporting or basic factual findings, is unsupported by substantial evidence,—in fact, is contrary to and in willful disregard of the facts established of record,—and constituted in general a flagrant and capricious abuse of the power and authority conferred upon it by statute (R. 1125).*

Inasmuch as the foregoing is but a résumé of some of the principal features which will be more specifically dealt with in the succeeding portions of our argument, particularly under Points II and III, we pretermit thereunder a detailed exposition of the grounds upon which same finds its support.

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* Germane to the entire case, including the assignments relating to the abortive effort of said Commission to coerce the appellant carriers into an acceptance of its findings without the issuance of a formal rate order by means of the peremptory withdrawal of fourth-section relief previously granted.

As a preliminary to the discussion which is to follow, however, we deem it apropós at the outset to direct attention to certain fundamental legal principles laid down by the courts which appellants maintain are decisive of the errors that pervade the Commission's findings and report of July 24, 1933, and its assailed rate order of December 11, 1933. Reference to other citations will be made as occasion arises.

An order of the Commission unsupported by essential basic findings is void.

Virginian Ry. Co. v. *United States*, 272 U. S. 658, 675.

Florida v. *United States*, 282 U. S. 194, 215.

United States v. *Baltimore & O. R. R. Co.*, 293 U. S. 454, 462-65.

United States v. *Chicago, M., St. P. & P. R. R. Co.*, 294 U. S. ——, 79 L. ed. (Adv. Ops.) 492, 495, decided March 4, 1935.

The standards for making rates established by the Interstate Commerce Act are transportation standards and the Commission is not authorized thereunder to prescribe rates determined by a consideration of commercial

or economic conditions unrelated to the transportation standard.

Texas & Pac. Ry. Co. v. *Int. Com. Com.*, 162 U. S. 197, 221.

Willamette Valley case, 219 U. S. 433.

Int. Com. Com. v. *Diffenbaugh*, 222 U. S. 42, 46.

United States v. *Ill. Cent. R. R. Co.*, 263 U. S. 515, 524.

Ann Arbor R. R. Co. v. *United States*, 281 U. S. 658, 669.

Texas & Pac. Ry. Co. v. *United States*, 289 U. S. 627, 638.

Atchison, T. & S. F. Ry. Co. v. *Int. Com. Com.*, 190 Fed. 591, 594.

Anchor Coal Co. v. *United States*, 25 Fed. (2d) 462, 472.

Point II

The action of said Commission in avowedly rejecting and in refusing to accord weight and legal significance to the numerous rate comparisons submitted in evidence by appellants in justification of the reasonableness of the rates on horses and mules contemporaneously maintained by them in compliance with prior orders of said Commission, whereby such rates were undeniably demonstrated to have been less than reasonable maxima through comparison

with the rates (and earnings derived therefrom) which had been prescribed by it on divers other commodities, constituted an illegal abdication by said Commission of the functions and duties imposed upon it by law, and the orders entered by it without according due weight and authority to such rejected evidence are vain, invalid, and useless (R. 1125-26).*

Under this topic we propose to show (a) that the Commission arbitrarily and capriciously rejected relevant and material evidence which, if given due weight, would have unquestionably compelled a finding that the rates on horses and mules originally prescribed were and are now not in excess of just and reasonable rates, (b) that there was no substantial evidence of record sufficient to justify the Commission's condemnation of the rates on horses and mules originally prescribed by it, and (c) that there is no jurisdictional finding by the Commission, even were there evidence of record to support such a finding, that there had occurred a subsequent change of conditions or that there were established other facts sufficient to support the action of the Commission in condemning the rates on horses and mules prescribed or authorized by it in 1924 and 1925 as just and reasonable for observance in southwestern territory.

* Germane particularly to the 6th, 7th, 14th, 15th, 50th, and 51st assignments of error (R. 153, 156-57, 161). See also the 9th, 10th, and 11th grounds for relief in Amended Bill (R. 40-44).

As the basis for this angle of appellants' attack upon the assailed findings and orders of the Commission, we reproduce from pages 440-41 of its report on further hearing (R. 86-87) the following:

> "Numerous exhibits were introduced by the carriers to show that the rates on horses and mules in the Southwest and western trunk-line territory are unreasonably low. One of the most pertinent of these is attached hereto as Appendix D, * * * The criticism of this exhibit, which criticism applies to practically all of the exhibits submitted by the carriers bearing on the contention that the rates on horses and mules are too low, is that the comparisons are with commodities that have few transportation characteristics in common with horses and mules. For example, there is nothing comparable between a carload of horses and mules and a carload of butter, green coffee, or scrap iron. In fact the only apt comparison is with other kinds of livestock. When the rates on different commodities are compared, the car-mile earnings afford a better index than ton-mile earnings. The earnings per gross (loaded and empty) car-mile on horses and mules under carriers' proposed column 45 rates are lower than on any commodity shown except cans, drums, and junk."

Appendix D to said report on further hearing (R. 100) is a substantial reproduction of sheet 2 of Exhibit C-208 identified and described (R. 678-80) by witness F. A. Swenson (see also the Commission's description on page 440 of its report—R. 86), and embodies a comparison of the rates and earnings on horses and mules for the haul

of 507 miles between Kansas City, Mo., and Fort Worth, Texas, with the rates for corresponding distances prescribed by the Commission to apply on numerous other commodities in *Consolidated Southwestern Cases* (Docket No. 13535), 123 I. C. C. 203, and with the earnings derived therefrom. On sheets 3 to 8 of the same exhibit appear similar comparisons of rates and earnings for the haul for varying distances between other points of origin and destination, and, as indicated by the Commission in the foregoing quotation, the showing in Exhibit C-208 is merely typical of similar rate comparisons which appear in numerous other exhibits presented by the carriers.*

It will be noted that the compared earnings on horses and mules set out in Appendix D (R. 100) to the Commission's report on further hearing are derived from the class A or column 45 (*i.e.*, 45 per cent of first class or column 100) rates prescribed in *Consolidated Southwestern Cases*, *supra*, which were advocated by appellants at the 1928 and 1932 hearings as affording a fair and reasonable basis of rates on horses and mules in the Southwest for the future.† For the greater convenience

* For example, Exhibits C-182 to C-185, witness S. C. Inkley (R. 666-67); Exhibits C-188 to C-199, witness F. B. Clark (R. 670-71); Exhibits C-221 and C-222, witness C. H. Pistor (R. 698); sheets 12, 13, and 14 of Exhibit C-280, witness Henry Christianson (R. 765).

† The Docket No. 13535 class A rates, as shown by Exhibit C-178 and as explained by witness S. C. Inkley (R. 843-44), are substantially the same as the class B rates there were prescribed in Docket No. 9702, **Memphis-Southwestern Investigations**, 55 I. C. C. 515, which were referred to in **Horse and Mule Rates in the Southwest, 1924**, 93 I. C. C. 479, 486, as representing the carriers' proposal of just and reasonable rates for the future, such rates having been superseded, however, by the lower Class B rates prescribed in No. 13535.

of the Court, we here present a portion of the rate and revenue comparisons set out in said Appendix D, except that, since the carriers' proposal of rates for the future is not in issue herein, we have substituted therefor the rates on horses and mules prescribed by the Commission in 1924 and 1933, respectively, together with the revenues per car and per gross car-mile accruing therefrom. The data so abstracted here follow:

Commodity	Average or Minimum Weight	Rate Cwt.	Revenue Per Car	Revenue Per Gross Car Mile
Horses and Mules	*23,000 lbs.	†57.5c	$132.25	$0.139
Horses and Mules	*23,000 lbs.	‡49.5c	113.85	.119
Agricultural Implements	29,000 lbs.	70c	203.00	.322
Bagging and Ties	46,000 lbs.	48c	230.80	.366
Bags and Bagging	46,000 lbs.	62c	285.20	.452
Tubs (Butter)	*16,000 lbs.	79c	126.40	.200
Beverages	46,000 lbs.	62c	285.20	.452
Broom Corn	*18,000 lbs.	70c	126.00	.200
Butter and Eggs	22,000 lbs.	106c	233.20	.267
Canned Goods (rated column 35)	42,000 lbs.	62c	260.40	.412
Canned Goods (rated column 38)	42,000 lbs.	67c	281.40	.445
Cans, Drums	*14,000 lbs.	88c	123.20	.195
Cans, Drums	* 9,000 lbs.	114c	102.60	.162
Coffee, Green	*36,000 lbs.	62c	223.20	.353
Fertilizer	46,000 lbs.	28c	128.80	.204
Fruits, Dried	50,000 lbs.	67c	335.00	.530
Furniture, New	14,000 lbs.	106c	148.40	.235
Glass Bottles	35,000 lbs.	67c	234.50	.355
Iron and Steel Articles	56,000 lbs.	57c	319.20	.505
Iron, Scrap	79,000 lbs.	31c	244.90	.388
Junk (rated column 22½)	*30,000 lbs.	40c	120.00	.190
Junk (rated column 32½)	*30,000 lbs.	57c	171.00	.270
Poultry, Dressed	25,000 lbs.	106c	265.00	.303
Poultry, Live	18,000 lbs.	114c	205.20	.202
Roofing Material	48,000 lbs.	44c	211.20	.334
Soap	44,000 lbs.	62c	272.80	.432
Soda (Nitrate)	46,000 lbs.	31c	142.60	.226
Starch	*40,000 lbs.	57c	228.00	.360
Sulphuric Acid in Carboys	*30,000 lbs.	67c	201.00	.318
Sugar	*60,000 lbs.	53c	318.00	.504
Syrup and Molasses	40,000 lbs.	53c	212.00	.335
Vinegar	*30,000 lbs.	62c	186.00	.294

* Minimum Weight.

† Rate for 507 miles prescribed in 1924, 93 I. C. C. 479, 498.

‡ Rate for 507 miles prescribed in 1933, 115% of fat cattle rate.

Let us pause a moment and analyze the significance of the Commission's observation quoted above. Really, when it is recalled that the courts have steadfastly refrained from overturning the findings of the Commission when they are supported by substantial evidence, predicated largely on the theory that with its special training and experience the Commission is better equipped than they to deal therewith, the implications attendant upon this statement are quite remarkable. It will be noted from the foregoing rate tabulation that on only a few commodities which load much more heavily than horses and mules are the rates per 100 pounds lower than on horses and mules, with the consequence that on only one commodity, to wit, Cans, drums, with a minimum carload weight of 9,000 pounds, is the revenue per car less than the per car revenue which the carriers receive on horses and mules under the rates prescribed in the Commission's 1933 report. It will also be noted that the revenue per car on horses and mules derived from the rate prescribed in 1924 exceeds the per car revenue on only such compared commodities as Tubs (butter), Broom Corn, Cans, drums, Fertilizer, and Junk (rated column 22½). And as remarked by the Commission in the quoted excerpt, an even stronger showing is made in the comparison of revenues per gross car-mile, which more accurately reflect the relative amount of aggregate transportation service required in the handling of the respective commodities.

On pages 445-446 of its report on further hearing (R. 91-92), the Commission enumerates various unusual expenses incurred in the transportation of livestock, none of which, it is said, is peculiar to the transportation of horses and mules. This we readily grant, and it is entirely conceivable that, should the carriers urge that their rates on so-called dead freight should be increased because of the existence of higher rates on horses and mules, the Commission might well answer that the more costly service performed in the handling of horses and mules justifies a higher level of rates thereon than on the other commodities, and that in consequence the comparison is not well taken. Likewise, a similar answer might be made to a contention on the part of the shippers that the rates on horses and mules should be reduced because of the existence of lower rates on the less expensive dead freight.

Yet even under such circumstances we submit that the Commission would not be justified in dismissing out of hand the rate comparisons so tendered for its consideration, but on the contrary it should proceed to analyze the differences in the various classes of the compared traffic and undertake to determine in the light thereof what rates on a given commodity would be just and reasonable. Unquestionably, the rates on horses and mules have their proper place somewhere in the rate structure, and it is only by making allowances in the

light of informed experience and judgment for the differences in transportation conditions and other relevant factors that a satisfactory conclusion can be reached.

But no such difficult or complex situation was before the Commission in these cases. Obviously, where the rates and earnings on the more expensive traffic are *less* than the rates and earnings on other traffic which can be and is more economically handled, we submit that there is no sound justification whatever for the declaration of the Commission that the rate comparisons presented by the carriers are subject to the criticism that they "are with commodities that have few transportation characteristics in common with horses and mules." It should require no special training or experience to recognize at a glance that, it being demonstrated that the rates and earnings on horses and mules are lower than those prescribed as just and reasonable on other traffic having less onerous transportation characteristics, it must follow of necessity that the rates on horses and mules are less than those which might be justified from a purely transportation standpoint. There is, of course, in the absence of a direct attack thereon, a legal presumption that rates prescribed by the Commission after full hearing do not exceed a just and reasonable

level, and hence it logically, if not inevitably, follows that lower rates on other traffic subject to more burdensome transportation incidents are less than just and reasonable from a transportation standpoint.

When the Commission undertook in 1924 to prescribe just and reasonable rates for observance on shipments of horses and mules in the Southwest, it exhibited no hair-splitting scruples or qualms of conscience concerning any want of similarity of transportation characteristics in the handling of horses and mules as contrasted with other commodities. In point of fact, as appears from page 493 of its 1924 report (93 I. C. C. 479), the Commission chose as "a consistent and reasonable basis for the statement of reasonable rates applicable to the interstate shipment of horses and mules in the Southwest" the commodity scale 12 rates which it had previously prescribed in *Memphis-Southwestern Investigation*, 77 I. C. C. 595, which, "with slight modifications," thereupon became the prescribed rates on horses and mules in the Southwest for a period of some nine years or more. Reference to the Commission's said report in *Memphis-Southwestern Investigation* (page 592) will disclose that the commodity scale 12 therein prescribed was designed to apply on such dead freight commodities as bags, potatoes, and soap.

Later on, in the report of the Commission on further consideration in *Hudson Mule Co.* v. *Railroad Co.*, 129 I. C. C. 365, decided July 11, 1927, wherein the complaint was dismissed after a prior award of reparation had been disallowed by this Court, *Patterson* v. *Louisville & N. Railroad Co.*, 269 U. S. 1; the Commission in part said on page 370:

> "The rates assailed are shown to compare favorably with the rates contemporaneously maintained on like traffic from the Ohio and Mississippi River crossings to other cities in the Southeast, with the rates applicable on ordinary 'dead' freight from the river crossings to Atlanta, with the rates on horses and mules for like distances in central territory, and with the distance scale found reasonable for the future in our original report."

And in November, 1934, and January, 1935, after the appeal from the decree of dismissal herein had been perfected, the Commission without compunction freely referred in support of its order of dismissal in two complaints involving the rates on horses and mules to comparisons made therein of the earnings derived from such rates with those accruing on dead freight commodities such as fresh meat, packing-house products, butter, eggs, poultry, apples, potatoes and cabbage. See *Grand Island Livestock Commission Co.* v. *Railway Co.*, 205 I. C. C. 267, 271; *Crandall Horse Co. v. Railroad Co.*,

206 I. C. C. 209, 210-11. In its report in the latter case, the Commission said that the assailed commodity rate of 78.5 cents per 100 pounds on horses and mules from Chicago to Buffalo and East Buffalo "yields lower per car and car-mile earnings than do numerous compared rates from Chicago to Buffalo on articles of dead freight rated third or fourth class."

Incidentally, the short-line distance mentioned in the report of 508 miles from Chicago to Buffalo and East Buffalo is almost precisely the same as that of 507 miles from Kansas City to Fort Worth used in the rate comparisons employed on sheet 2 of Exhibit C-208 reproduced as Exhibit D (R. 100) to the Commission's report herein; and in its report the Commission mentions that the present rates of 49.5 cents for 508 miles prescribed to apply within and between southwestern and western trunk-line territories, and of 53.5 cents approved in the southern livestock investigation, are less than the fourth-class rate of 55 cents (50 per cent of first-class) which the carriers recently published to apply on horses and mules from Chicago to Buffalo and East Buffalo in conformity with the Commission's decision in *Galesburg Horse and Mule Co.* v. *Railway Co.*, 196 I. C. C. 739, 203 I. C. C. 167.

Similarly, throughout its report in *Nonferrous Metals*, 204 I. C. C. 319, decided November 5, 1934, the Commission referred freely (pages 333, 334, 355, 363, 369, 370

and 377) to comparisons of record therein of the rates and revenues on the commodities under review therein "with those on a wide range of other commodities," included among which are cattle, hogs, horses and mules, etc., and near the bottom of page 334 appears this comment: "It is apparent from these comparisons and many others of record that the rates, as a whole, on ore and concentrates in Mountain-Pacific territory are less than maximum reasonable rates."

In 1933, though, for some reason left wholly to inference, the Commission could not see its way clear to take such rate comparisons into account. It is quite patent that this unexpressed reason was that they afforded an insurmountable obstacle to the imposition upon the carriers of the rate reductions upon which it is obvious the mind of the Commission was fatally bent, and hence the obstructive exhibits were conveniently *spurlos versunken*, if we may borrow a familiar phrase reminiscent of the late World War.

But that is not all. In making the declaration in the preceding quotation that the rate comparisons relied upon by appellants herein "are with commodities that have few transportation characteristics in common with horses and mules," the Commission manifestly overlooked the fact that among such compared commodity rates and earnings are those on live poultry, which

clearly may not be classed as dead freight. Live poultry as well as horses and mules require expedited service; both commodities move in special types of equipment of which the empty return movement closely approximates (R. 84) the loaded hauls; in each instance the tariffs in the western district authorize (123 I. C. C. 256, 176 I. C. C. 95) caretakers to accompany the shipments without additional charge; and in various other respects they are subject to quite similar transportation incidents. This analogy of transportation characteristics was pointed out by witness Henry Christianson (R. 811-12) in the testimony of record.

In *Consolidated Southwestern Cases*, 123 I. C. C. 203, the Commission prescribed a full set of mileage class rates to apply uniformly throughout the Southwest, as well as a modified group basis to apply between the Southwest and the greater part of the United States east of the Rocky Mountains (but not the western portion of western trunk-line territory), and along with the class rates there were additionally prescribed numerous so-called commodity rates based upon stated percentages of the first-class or 100 per cent rates. Among the commodity rates so prescribed were those on live poultry (123 I. C. C. 256-259, 464), to which commodity

were assigned the column 65 rates (65 per cent of first-class or column 100).* We therefore present below a comparison of the southwestern horse and mule rates for the distance of 507 miles between Kansas City and Fort Worth, both those prescribed in 1924 and those prescribed in 1933, with the rates on live poultry likewise prescribed by the Commission for the same distance:

Commodity	Minimum Weight	Rate Cwt.	Revenue Per Car
Horses and Mules	23,000 lbs.	*49.5c	$113.85
Horses and Mules	23,000 lbs.	†57.5c	132.25
Live Poultry	18,000 lbs.	114c	205.20

* 115 per cent of fat cattle rate for 507 miles.
† Rate for 507 miles prescribed November 10, 1924.

In view of the foregoing, if $205.20 represents a reasonable charge *from a transportation standpoint* (and under the statute the Commission is not authorized to prescribe or approve rates that are unjust or unreasonable) for transporting a carload of 18,000 pounds of live poultry for a distance of 507 miles, then the $132.25 that was assessed prior to August 1, 1934, under the rate prescribed in 1924 for the transportation between points in the Southwest of a carload of 23,000 pounds of horses and mules for that distance must of necessity be *less* than a reasonable maximum charge therefor, and *a*

* Live poultry moves in specially constructed cars owned by private-car lines, a separate charge for the use of which is paid by the shipper in addition to the transportation charge of the carrier. National Poultry, Butter & Egg Assn. v. Aberdeen & R. R. R. Co., 192 I. C. C. 13, 16.

fortiori the charge of $113.85 that now accrues on the 115 per cent basis that became effective on August 1, 1934, is still less defensible. Truly, as was several times observed by witnesses who appeared before the Commission (*e. g.*, J. A. Lynch, R. 320; M. J. Dowlin, R. 341; F. B. Clark, R. 544; Henry Christianson, R. 813-14), even under the rates that prevailed in the Southwest prior to August 1, 1934, horses and mules were not bearing, and of course to an even greater extent do not now bear, their proper share of the transportation burden. Under § 1 of the Interstate Commerce Act appellants are entitled to just and reasonable rates on horses and mules that will enable that traffic to bear its proportionate part of the transportation burden. *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, l. c. 421.

As remarked above, it has been the practice of the courts to accord great weight to the findings and conclusions voiced by the Commission on the theory that they are reflective of its trained judgment as a body of experts appointed by law and informed by experience in such matters. But when the Commission publicly proclaims, as in essence it does in this instance, that it has not the ability to analyze and weigh the effect of the varying transportation incidents that enter into a determination of the rates that should properly be applied on one commodity as contrasted with another, we believe

the courts will be constrained to be far more critical than they have been in the past of the findings and conclusions expressed by the Commission in its reports.

The present refusal of the Commission to test the reasonableness of the horse and mule rates in the Southwest by the rate comparisons submitted for its consideration by appellants is tantamount, we submit, to a refusal on its part to accept jurisdiction and to conform to the duties imposed upon it by the statute which it administers. In justification of this assertion we here reproduce by way of analogy the following excerpt from *Mondou* v. *New York, N. H. & H. R. R. Co. (Second Employers' Liability Cases)*, 223 U. S. 1, 58:

> "* * * be that as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

It may be urged, though, that the prescribing of rates for the future is a legislative and not a judicial function, but only recently, in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, this Court declared at page 420 that the Congress may not constitutionally abdicate its legislative functions by vesting the power to legislate in the President or other grantee. It was there said that the Congress, after laying down policies and establishing stand-

ards, may leave to selected instrumentalities "the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply," but when that is done the duty devolves upon such "selected instrumentalities" to conform their official acts to the policies laid down and the standards established by the legislative authority. And this, appellants maintain, the Commission in this instance has signally failed to do.

Let us now approach the subject from yet another angle. As we have already seen, by its decision in 1924 and 1925, the Commission in the light of a voluminous record authorized appellants to publish and maintain certain prescribed basic mileage rates on horses and mules, to which they were permitted to add stated additional arbitraries or differentials for that part of the haul in Texas differential territory, but by its 1933 report and order the Commission overturned its prior decisions and in effect ordered and directed appellants thereafter to establish and maintain a much lower level of mileage rates on horses and mules uniformly throughout the Southwest as a whole, including Texas differential territory, the same mileage rates being likewise prescribed to apply in western trunk-line territory on the north.

Lest their position on this point be misunderstood, we hasten to add that appellants make no contention, as will doubtless be urged by appellees, that the Commission may not legally make findings and prescribe rates which are contrary to and different from its previous conclusions and decisions. But appellants do say that, having once after full hearing and deliberation announced its conclusions deduced therefrom and prescribed a scheme of just and reasonable rates in the light thereof, the Commission is not privileged to set aside and nullify its prior conclusions and decision without assigning just cause for doing so. This is strictly in accord with the standard or rule of conduct heretofore laid down by the Commission itself as a guide in such matters. Thus, as far back as March 13, 1917, in *Traffic Bureau of Nashville* v. *Railroad Co.*, 43 I. C. C. 366, there appears at page 369 the following:

> "When the Commission, upon a given state of facts, reaches a conclusion regarding a certain rate, it will adhere to that conclusion in subsequent proceedings regarding the same rate, unless (a) some new facts are brought to its attention, (b) conditions are shown to have undergone a material change, or (c) it proceeded on a misconception or misapprehension."

This is good, sound doctrine, and we respectfully submit that, had the Commission only kept the faith in this

instance and followed the precept so laid down by it, the carriers would not now be before this Court seeking relief from its assailed order of December 11, 1933.

In its 1924 report (93 I. C. C. 479), the Commission states at pages 482 and 487 that it was contended by the complainants that the rates on horses and mules should not exceed the cattle scale by more than 15 per cent, but we have shown that such contention was then rejected by the Commission and that instead a scale of rates previously prescribed to apply in the Southwest on bags, potatoes, and soap was adopted by the Commission as reflecting a proper basis of rates to be applied on horses and mules in that general territory, and in 1925 (102 I. C. C. 87), because of the more onerous transportation conditions shown to exist in that part of the Southwest, the Commission authorized the carriers to add specified arbitraries or differentials to the prescribed basic rates for that portion of the hauls of horses and mules in Texas differential territory. The evidence upon which these two decisions and the findings and conclusions therein were grounded is voluminous. The condensed narrative statement of the testimony covers 295 pages of the printed record (R. 184 to 478), which testimony was supported by a large number of exhibits. These exhibits have not been reproduced in the printed record, but they were generally commented upon quite freely in the testimony of the witnesses who identified

them, besides which a more or less detailed description thereof appears in the printed record. (R. 1134 to 1156.)

None the less, despite these facts, we look in vain to the 1933 report of the Commission for any finding or declaration that its earlier decisions had proceeded on a misconception or misapprehension, that any new facts had been brought to its attention, or that conditions were shown to have undergone a material change such as would call for a revision of the rates on horses and mules previously fixed by it as just and reasonable for application in southwestern territory. We grant that, as stated by the Commission on page 425 of its report on further hearing (R. 71), there was a marked decline in the value of both horses and mules between 1924 and 1932 (the last hearings before the Commission were closed on May 27, 1932—R. 893), but that is more than offset by the desperate financial plight of the carriers that has developed during the past few years. For that matter, in its report in *General Rate Level Investigation, 1933*, 195 I. C. C. 5, decided July 31, 1933, which was an investigation instituted by the Commission (page 8) "for the purpose of determining whether and to what extent, if any, reductions in the rates and charges of carriers by railroad * * * should be required * * * upon any commodities or descriptions of traffic," the Commission expressed the conclusion on page 69 to the effect that the decline that has taken place in commodity

prices and the generally depressed condition of industry affords no predicate for imposing upon the carriers a rate reduction in the absence of a special showing as to particular commodities in justification thereof. As to horses and mules, though, the Commission's report herein is wholly devoid of a reference to any special circumstance or condition which would warrant the exception thereof from the general conclusion so announced.

This brings us back to the proposition we have previously urged, namely, that there is an utter absence of jurisdictional findings to support the assailed rate order of December 11, 1933. We accept the test which the Commission itself laid down in *Traffic Bureau of Nashville v. Railroad Co., supra*, and assert that the failure of the Commission in this instance to follow its own precept is tantamount to a denial to appellants of the equal protection of the law. The guiding principles so formulated by the Commission do not in any sense relate to administrative discretion; they contemplate a rule of conduct which should be followed and applied by the Commission uniformly and impartially. Otherwise, they are subject to condemnation under the following declaration of this Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-74:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority * * * with an un-

> equal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibiton of the Constitution."

We recognize that the contention may be advanced that the Commission, since it commented upon the rate comparisons relied upon by the carriers and reproduced as Appendix D (R. 100) to its report a typical example thereof, did, in fact consider such evidence. But such an argument is wholly untenable; *Chicago Junction Case*, 264 U. S. 258, l. c. 265; *Florida* v. *United States*, 282 U. S. 194, 215. A consideration and weighing of the evidence pro and con such as is contemplated by the courts when they decline to disturb a finding that is supported by substantial evidence contemplates, we submit, a fair and impartial examination of *all* the evidence, accompanied by an appropriate and impartial finding of its deductions therefrom. The very fact that the Commission condemned the rates on horses and mules in the Southwest previously prescribed or authorized by it and thereupon prescribed much lower rates on that traffic than those it had fixed on other commodities, coupled with its affirmative declaration that the rate comparisons relied upon by appellants are subject to the criticism that they "are with commodities that have few trans-

portation characteristics in common with horses and mules," most clearly demonstrates that such evidence did not receive from the Commission the serious and dispassionate consideration to which it is legally entitled.

The ultimate proposition which appellants seek to sustain in this connection is that it is not the function of the courts to speculate on what conclusions the Commission would have deduced from the rejected or discarded rate comparisons had they been fairly and conscientiously analyzed and weighed. The self-evident fact that the Commission did not give serious consideration thereto is alone sufficient to condemn the conclusions which were reached by it and its rate order based thereon. It is not for the Commission to cull out only so much of the evidence as tends to support a particular conclusion arbitrarily arrived at and to disregard the remainder. *Southern Ry. Co.* v. *Eichler*, 56 Fed. (2d) 1010, 1015.

We do not overlook the fact that in the same connection the Commission asserted that "the only apt comparison is with other kinds of livestock." That phase of the case will be dealt with in the next succeeding topic, it being sufficient to here state that the rates on edible livestock avowedly reflect the near-tragic economic condition of the industry rather than the cost of the service performed in the light of the transportation standard,

and hence afford no fair or lawful standard by which to determine just and reasonable rates on a commodity not subject to like economic conditions.

We have stated above it would be shown that there was no substantial evidence of record sufficient to justify the Commission's condemnation of the rates on horses and mules originally prescribed by it. For obvious reasons, affirmative proof of that assertion would require a detailed review of the entire record before the Commission, which of course is wholly impracticable, but we believe that what we have had to say is sufficient to demonstrate indirectly the absence of such evidence. At all events, if they can produce anything to the contrary, we take it that appellees will direct the attention of the Court thereto. For that matter, though, it must be presumed that the Commission itself would have pointed in its report to any evidence of changed conditions or the like that might have been available, and the absence of such essential findings is alone a strong indication that there was no evidence before it to support a finding of that nature.

Point III

It being patent from the face of said Commission's report wherein maximum reasonable rates were prescribed to apply on shipments of fat cattle in south-

western territory that such rates were predicated upon the economic distress of the edible livestock industry and with scant heed to or recognition of the transportation standard, and there being no finding by it of the existence of the same or of a similar economic distress in respect of the horse and mule traffic or of the existence of improved transportation conditions, nor in addition any factual basis for such findings, the prescribed fat cattle rates afford no lawful guide by which to measure the reasonableness of the rates on horses and mules, and the action of said Commission in condemning rates on horses and mules previously prescribed by it and thereafter continued in effect without complaint for a period of eight or nine years, and in prescribing in lieu thereof, because of a purported greater or less similarity of transportation conditions between the two classes of livestock, much lower rates which shall not exceed by more than 15 per cent the admittedly low and depressed rates on fat cattle in that area, constituted an illegal disregard of the evidence of record before it and an abuse of the powers and authority conferred upon it by law, and all orders predicated thereon are vain, invalid, and useless (R. 1126).*

* Germane particularly to 8th, 10th, 40th, 41st, 42nd, 43rd, 44th, and 55th assignments of error (R. 153-54, 155, 161). See also the 2nd, 3rd, 4th, 5th, 6th, 7th, and 14th grounds for relief in Amended Bill (R. 30-38, 49-50).

Point V

In undertaking to prohibit appellants from maintaining and applying carload rates on horses and mules in southwestern territory which exceed by more than 15 per cent the rates theretofore prescribed to apply on fat cattle in a wholly different proceeding, and upon a radically different showing of economic and transportation conditions affecting the traffic, said Commission has unlawfully based its assailed orders upon evidence not legally before it in the cases wherein such orders were entered, and the latter are hence arbitrary, illegal, and void (R. 1126-27).*

The fundamental showing which appellants propose to make under these points, which are related and will be considered together, are that, as disclosed on the face of the Commission's report dealing therewith, the rates which it prescribed to apply on shipments of fat cattle and other edible livestock in the western district, including the Southwest, were palpably based upon the principle of what the traffic will bear and in recognition of the economic distress of the industry rather than upon the transportation standard, whereas the same or like conditions do not prevail in respect of the horse and mule traffic, nor are there any essential factual findings

* Germane particularly to 9th assignment of error (R. 154-55). See also 2nd and 3rd grounds for relief in Amended Bill (R. 30-33).

by the Commission to justify the fixing of rates on horses and mules on a reduced basis in relation to the rates prescribed under such circumstances on fat cattle.

Stated conversely, while admittedly depressed and subnormal rates were prescribed on fat cattle and other edible livestock on the theory that they were as high as the traffic would bear, the Commission ignored that principle of rate-making, as affirmatively disclosed by the evidence of record, in prescribing a reduced level of rates on horses and mules in southwestern territory, with the consequential result that the prescribed rates on horses and mules were predicated not upon the facts established of record herein but upon the evidence in a wholly distinct proceeding. Appellants further maintain that, inasmuch as the rates prescribed to apply on fat cattle were admittedly determined with but scant regard to transportation considerations, the existence of a general similarity or even an identity of the transportation characteristics incident to horses and mules and fat cattle, respectively, affords in consequence no reliable or lawful guide by which to measure the rates on horses and mules. Other contentions correlative to the foregoing will be developed in the course of the ensuing discussion.

Inasmuch as the Commission, in striking down the rates previously prescribed by it to apply on horses and mules in the Southwest, substituted therefor a much lower basis of rates which it was directed should not

exceed by more than 15 per cent the rates prescribed to apply on fat cattle in southwestern territory in *Livestock-Western District Rates*, 176 I. C. C. 1, we proceed at the outset to substantiate our claim that the prescribed rates on fat cattle and other edible livestock are not reflective of transportation conditions but on the contrary were in the main prescribed with but slight regard therefor. That this is so, we confidently assert, is readily demonstrable from the "apologia" embodied by the Commission within the four corners of its report in which such rates were prescribed, coupled with further observations incorporated in a subsequent report on further hearing in the same proceeding, 190 I. C. C. 611. Indeed, as we shall shortly disclose, the rates so prescribed on edible livestock are on such an absurdly low plane that it would be difficult to find any other commodity yielding anything like as small a return to the carriers for the services performed by them in the transportation thereof.*

Throughout its report in the western district livestock case there appear numerous passages which bear witness

* While the Commission painstakingly refrained from explicitly so stating, in the view of appellants it is patent from its report in Livestock-Western District Rates, cited above, that the rates on edible livestock therein prescribed were influenced by the same considerations which caused this Court in Ann Arbor R. R. Co. v. United States, 281 U. S. 658, to hold unlawful the Commission's order prescribing reduced rates on deciduous fruits, due to the erroneous interpretation placed by it upon the legal effect and meaning of the so-called Hoch-Smith Resolution of the Congress. It will be noted that the western district livestock case was Part 9 of the Docket No. 17000 general investigation inaugurated by the Commission pursuant to that congressional resolution.

to the fact that the almost prostrate economic condition in which the edible livestock industry has existed for many years past was the underlying thought by which the conclusions arrived at therein by the Commission were dominated. To begin with, let us refer to the statement on pages 43-44 of said report (176 I. C. C. 1), where the declaration was made that, "In our view, livestock* is not a class of traffic upon which a rate level should be maintained which will compensate for losses or lack of adequate or average earnings on passenger traffic or any other class of traffic."

Then, beginning on page 72 of its report, under the caption entitled "Condition of Livestock Industry" the Commission reviews rather extensively what are termed the major developments of the post-war period in respect of the economic conditions attendant upon the edible livestock industry, such as the liquidation that followed the price collapse of 1920, the partial recovery that set in about 1924, and the like. And at the conclusion of the topic will be found the following expression of the Commission's views (pages 82-83) upon the question of what constitutes the maximum level of rates that it con-

* The Commission's references to "livestock" throughout its report relate solely to edible livestock, to a consideration of which the proceeding was limited, as will be noted from page 7 of its report therein. In its order inaugurating that proceeding of May 16, 1927 (Exhibit AG, R. 176), its scope was explicitly limited to the rates on edible livestock.

sidered it would be warranted in authorizing on edible livestock in the western district:

> "Agriculture, one of our great basic industries, is probably unique in that it can not set the price at which its product is sold with relation to the cost of production. The price it receives for its product is fixed largely by forces outside its control. * * * A just and reasonable rate level is one that is justly and fairly related to other just and reasonable rates and that covers the cost of rendering the service and includes some profit to the carrier in the aggregate. The extent of that profit is generally determined by the well-known rule of 'what the traffic will bear,' which is largely controlled by the nature of the commodity and the distance it must move to find a market. Livestock, as we have elsewhere indicated in this report, is a commodity which from its nature can not be expected to do more than 'pay its own way'; that is, it can not sustain a rate level which will produce more than the cost of rendering the service plus a minimum of profit. Judged even by these standards, livestock in portions of the western district is not at present bearing its fair share of the transportation burden; and under the rate levels herein found reasonable it will do no more than meet these minimum requirements. Indeed there is room for doubt whether the rates found reasonable will, on sheep and hogs, single-deck, and, for the longer hauls of sheep and hogs, double-deck, and cattle, say above 1,000 miles, produce more than a small margin above the actual cost of transportation. The importance of the freight charge to the shipper increases in proportion as its relation to the value of the load increases; hence in making rates for the longer distances or on the single-deck shipments the

> question of what the traffic will bear and continue to move freely may properly tend to a narrowing of the margin of profit."

In the foregoing quotation will be found the key which enables us to peer, though rather vaguely, into the minds of the members of the Commission who subscribed to the majority report, although an even better understanding of the influences by which the majority members were actuated may be obtained by a perusal of the vigorous dissents voiced on pages 159-70 by Commissioners Lewis, Porter, and Mahaffie, to which the attention of the Court is invited.* But, if the foregoing is not abundantly sufficient to demonstrate that the rate scales prescribed by the Commission to apply on edible livestock in the western district reflect the opinion of the majority members as to what constitute the maximum rates which the traffic will bear and continue to move freely, the following passage from page 633 of its report on further hearing in that proceeding (190 I. C. C. 611) should prove conclusive on the subject:

> "The economic condition of the livestock industry has a direct bearing upon a basic element in rate-making, namely, what the traffic will bear, or in other words, the value of the service to the shipper. In *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, 560-566, we discussed at length some of the basic principles involved in the consideration of propos-

*It is of interest to note additionally that Examiner Simons flatly declared in his proposed report (R. 1032), which antedated the decision in the Ann Arbor case, that the Hoch-Smith resolution does not sanction a differentiation of horses and mules from other kinds of livestock.

als to increase freight rates, and *inter alia* quoted with approval the following from 10 Corpus Juris 418:

"'The public is entitled to demand that no more shall be exacted from it than the services rendered are reasonably worth, and this right takes precedence even over the right of the carrier to a fair return on its investment when the two rights can not stand together. In consequence, the value of the service to the public is an important factor in determining the reasonableness of the rates charged therefor.'

"We have repeatedly held that the value of the commodity transported has a direct bearing upon the value of the service rendered. The large reductions in the prices of livestock since 1928, as disclosed herein *ante*, are of course directly reflected in the per-car values of the livestock offered for transportation."

As we have previously had occasion to observe, in *Consolidated Southwestern Cases, supra*, effective July 14, 1928, the Commission provided that just and reasonable maximum rates on live poultry would be represented by taking 65 per cent of the corresponding first-class rates therein prescribed. For the distance of 507 miles between Kansas City and Fort Worth the rate of $1.14 on live poultry so prescribed is set out in Appendix D (R. 100) to the Commission's report herein of July 24, 1933, a comparison of which we have already made with the rates on horses and mules prescribed in 1924 and

1933. We now present a similar comparison of this live poultry rate and the per-car revenue accruing thereon with the rates and per-car revenues prescribed to apply for that distance on fat cattle and on hogs in "single-deck" cars, the latter as in the case of the assailed horse and mule rates being 115 per cent of the fat cattle rate, though with a lower minimum weight than horses and mules:

Commodity	Minimum Weight	Rate Cwt.	Revenue Per Car
Beef Cattle	22,000 lbs.	43c	$ 94.60
Hogs	16,500 lbs.	49.5c	81.68
Live Poultry	18,000 lbs.	114c	205.20

On stocker cattle and stocker hogs the Commission further provided, subject to certain restrictions as to when they will be applicable, rates that are 85 per cent of these basic cattle and hog rates and subject to even lower minimum weights. We thus have two sets of rates, each prescribed by the Commission, which apply on commodities that move, as we have seen, under quite similar transportation conditions. Appellants therefore say that in truth, if the $205.20 revenue per car authorized in the case of live poultry reflects a just and reasonable compensation for the transportation service performed, as based upon the transportation standard, it must unquestionably follow that rates which produce considerably less than half that amount for an almost identical service were not fixed in the light of the transportation

standard but upon consideration, as stated by the Commission in its report, of the extremely depressed econnomic status of the livestock industry or upon some like extraneous circumstance altogether unrelated to the transportation standard.

Surely, as the Commission itself recognized on page 67, such inordinately subnormal rates on edible livestock afford no just or safe guide by which to determine maximum reasonable rates on horses and mules or, for that matter, any other commodity. The carriers did not, it is true, see fit to seek an injunction against the absurdly low rates prescribed by the Commission on edible livestock, as they have here done in respect of the reduced rates prescribed on horses and mules in the Southwest; but the manifest reason therefor lies in the fact that they recognized that from a practical standpoint, even were they to prevail, such a contest would in all probability be fruitless because of the near-prostrate condition of the edible livestock industry, which condition, as disclosed by Exhibit AQ (R. 1116), continued to persevere up to the time this cause was heard in the court below. An entirely different condition prevails in the marketing and production of horses and mules, however, and for that reason appellants feel they have ample justification to warrant their actions in seeking injunctive relief in the case at bar.

It may be urged by opposing counsel, though, that the Commission may lawfully make use of the prescribed scale of fat cattle rates as a basis for fixing maximum reasonable rates on horses and mules, and that it is simply a question of administrative discretion to be determined by the Commission whether the horse and mule rates shall be 115 per cent or 125 per cent or some other percentage of the fat cattle rate. But not so. It is obvious from the Commission's report in *Livestock-Western District Rates, supra*, that not only was the dire economic distress of the edible livestock industry a controlling factor in determining the volume of the rates prescribed on that traffic, but a consideration of such conditions likewise entered into a determination of the rate of gradation of the edible livestock rate scales. That this is so is self-evident from the following comment on page 83 of the report therein:

> "The importance of the freight charge to the shipper increases in proportion as its relation to the value of the load increases; hence in making rates for the longer distances or on the single-deck shipments the question of what the traffic will bear and continue to move freely may properly tend to a narrowing of the margin of profit."

The Commission further says on page 67 that the trend of movement of edible livestock toward a focal point in the East where all livestock or its product tends

to concentrate makes every shipper an actual or potential competitor of every other shipper to a greater extent, probably, than is true of any other widely produced commodity. These circumstances have no application to the horse and mule industry, with the consequence that, since they were influential in bringing about a low gradation of the rates on fat cattle, the resulting fat cattle rates afford no just or lawful criterion by which to determine upon any percentage relation thereto just and reasonable rates on horses and mules.

It developed from the testimony of the numerous complainant horse and mule dealers and shippers who appeared as witnesses in the consolidated proceedings (R. 66-67) that, unlike edible livestock, they assemble the animals at the primary markets, such as Fort Worth, Wichita, Kansas City, and Omaha, and even as far east as East St. Louis and Chicago, where they are auctioned, and thence are shipped to other portions of the country in which there is found a demand therefor. From the Southwest, as stated by the Commission (R. 67), the latter movement is principally to the Southeast, and the rates applied thereto are combinations of local rates to and from intermediate points, usually the Mississippi River crossings, i.e., Memphis, Vicksburg, Natchez, and New Orleans.

These combination rates substantially exceed for the aggregate interterritorial distances the rates that would

result from the application thereto of either the southwestern scale prescribed in 1924 or the southeastern scale approved in *Livestock, Southern Territory Rates*, 171 I. C. C. 721. They have been assailed in a number of recent complaints, but the Commission has declined to hold them to be unjust or unreasonable in the past and consistently denied an award of reparation to the complainants. See *Patterson* v. *Railroad Co.*, 197 I. C. C. 591, 200 I. C. C. 766; *Carl West* v. *Railroad Co.*, 198 I. C. C. 551; *Fies & Sons* v. *Railroad Co.*, 201 I. C. C. 523; *Team Mule Co.* v. *Railroad Co.*, 201 I. C. C. 633. These distinguishing facts clearly demonstrate that the low rate of progression of the edible livestock scales affords an altogether inadequate yardstick by which to measure the reasonableness of the rates on horses and mules.

In *Burnet* v. *Brooks*, 288 U. S. 378, this Court recently had occasion to observe on page 389 that "the Congress did not enact a maxim." In like manner, appellants here maintain that the Interstate Commerce Act does not contemplate that the rates which the Commission is directed and authorized to prescribe thereunder shall be determined by formulas and other like arbitrary methods; on the contrary, they say that it was intended thereby that in prescribing rates on a given commodity the Commission should give consideration to the facts and circumstances appertaining to that particular commodity

and not to the divergent facts and circumstances governing some other traffic. We take it that these principles are fundamental.

In the light of the foregoing, we accordingly now propound the following query: Even though it be a recognized rule of rate-making, *Ann Arbor R. R. Co.* v. *United States, supra*, at pages 666-67, that "conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness," as was avowedly done by it in *Livestock-Western District Rates, supra*, (*cf. Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, 421), why should not the same rule govern the determination of the reasonableness of rates in another industry subject to widely divergent conditions affecting that industry? Or, stated conversely and with direct application to the rates in hand, what justification is there for employing the abnormally low rates that were prescribed to apply on fat cattle upon radically different evidence from that of record herein because of the depressed economic conditions affecting that commodity as a criterion by which to measure the reasonableness of the rates on horses and mules in the absence of a jurisdictional finding supported by substantial evidence that the production and marketing of horses and mules are subject to like or similar economic conditions?

It has been well said that it is a poor rule that does not work both ways. Since in prescribing rates on fat cattle and other livestock the Commission proceeded upon the principal of "what the traffic will bear and continue to move freely" (176 I. C. C. 83), then we most earnestly submit that in determining the reasonableness of the rates on horses and mules in the Southwest the Commission was called upon to give equal consideration to the demonstrated ability of the traffic to move freely on the rates previously prescribed or approved,* but that in this instance the Commission signally disregarded that fundamental principle of justice and fair dealing. And this we shall now proceed to demonstrate by reference to undenied and undeniable evidence of record before the Commission (adduced indeed by the complainant in No. 13001, the Kansas City Chamber of Commerce).

To that end, we refer to sheet 1 of Exhibit C-291, identified and described (R. 803) by witness J. H. Tedrow, Transportation Commissioner of the Kansas City Chamber of Commerce (R. 802), which sets forth the receipts of horses and mules at the principal markets for

* Cf. Sinclair Ref. Co. v. Jenkins Co., 289 U. S. 689, l. c. 697-98, where this Court sagely said: "This is not a case where the recovery can be measured by the current prices of a market. * * * There can be no contemporaneous sales to express the market value * * * But a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within." And in Lindheimer v. Illinois Tel. Co., 292 U. S. 151, l. c. 164, it was similarly declared that "Elaborate calculations which are at war with realities are of no avail."

the year 1900 to 1931, the latter being the last full year available at the time the Commission hearings were closed in May, 1932. Since the Commission in 1924 and 1925 prescribed or approved rates on horses and mules to apply to and from the primary markets of Ft. Worth, Tex., Wichita, Kans., and Kansas City, St. Joseph and St. Louis, Mo. (East St. Louis, Ill.), we have abstracted and reproduce below from Exhibit C-291 the following data (see also page 31—R. 1064—of appellants' petition for reconsideration and rehearing, where there appears a statement of the number of cars of horses and mules originated and handled in the southwestern region from 1926 to 1929) with immediate regard to the receipts at those five points for the years since the first of the consolidated complaints herein under review were filed:

RECEIPTS OF HORSES AND MULES AT PRINCIPAL MARKETS, 1920-1931

(Receipts shown in thousands)

Year	Fort Worth	Wichita	Kansas City	St. Joseph	East St. Louis*	Total (compiled)
1920	45	24	72	30	141	312
1921	13	11	30	12	68	134
1922	29	18	38	16	95	196
1923	58	23	43	15	102	241
1924	46	21	36	11	64	178
1925	34	19	34	9	65	161
1926	27	17	29	9	53	135
1927	42	23	44	7	68	184
1928	43	23	43	9	70	188
1929	42	18	52	7	70	189
1930	27	15	55	5	51	153
1931	13	11	33	4	40	101

*St. Louis (East St. Louis) is the recognized horse and mule market of the world (R. 375).

There is nothing in these figures remotely indicating that the rates on horses and mules in the Southwest prescribed by the Commission in 1924 and discarded in 1933 in any wise tended to restrict the free movement of the traffic. Bearing in mind the fact that the 1924 rates were not published and made effective until about the middle of 1925, it will be noted that, although there was a slight recession in the volume of receipts at the Fort Worth market in 1925 and 1926, the same is true at the three principal compared primary markets, each of which had the advantage of the lower level of rates on horses and mules that prevailed at that time in western trunk-line territory.

In 1927, 1928, and 1929 there was a considerable increase in the volume of receipts at Fort Worth, as likewise at Wichita, Kans., and East St. Louis, and it was only with the beginning of the depression era that a material slump in the receipts occurred at Fort Worth. The same is true of the compared markets in the western trunk-line States, though, yet the Commission frankly states on page 447 of its 1933 report (R. 93) that the prescription of rates on horses and mules made 115 per cent of its fat cattle rates would result "in increases in the rates from, to, and between points in the western trunk-line States." In short, the Commission manifestly was not actuated by the reduced volume of movement during 1930 and 1931 in prescribing lower rates on

horses and mules in the Southwest—else it would have been constrained to reduce similarly the rates in western trunk-line territory, or at least not to authorize any increases thereof.

Besides the above, the Commission also had before it as Exhibit C-351 (R. 889-91) a copy of the testimony given at the hearing held in December, 1931, in No. 24674, *Patterson* v. *Railroad Co.*, 197 I. C. C. 591, that it had been only in the last five years prior thereto that "that stuff" moved in volume from southwestern territory to his firm at Atlanta, and more recently, in July, 1933, as disclosed by Exhibit AL (R. 1110-11), one of the complainants who testified in No. 25767, *R. H. Cargile* v. *Railway Co.*, consolidated with No. 25710, *Patterson* v. *Railroad Co.*, 200 I. C. C. 766, declared in substance on cross examination that the available supply of horses and mules was then becoming depleted, there having developed a scarcity of such animals in Texas up to the usual standard. All this testimony clearly demonstrates that the traffic was moving freely and without hindrance under the 1924 and 1925 rates.

It is significant that the fluctuations in the receipts of horses and mules at the Fort Worth market during the period the 1924 rates were in force and effect correspond closely to the totals of the receipts at the five markets listed in the foregoing tabular statement, and this we believe proves as conclusively as can possibly

be done by factual demonstration that the traffic moved freely and without hindrance on the rates prescribed and approved by the Commission in 1924 and 1925. Certainly, the Commission has made no jurisdictional finding that the rates so prescribed are all that the traffic will bear or that it has not moved and will not continue to move freely on such rates. That being true, it constituted an improper use of its powers for the Commission to employ rates prescribed to apply on fat cattle on the theory that they were all the traffic would bear and continue to move freely as a yardstick or guide for the purpose of bringing about a reduction of the rates on horses and mules in the Southwest in the face of positive evidence of record that the traffic was moving as freely thereon as on the lower rates prevailing in the western trunk-line States.

Again we say, it is a poor rule that does not work both ways. Most certainly the determination of the Commission that the previously prescribed rates on horses and mules in the Southwest have become unreasonable finds its only support in the evidence in a wholly distinct proceeding concerned with the rates on edible livestock.

The Commission declares, however, that the transportation conditions incident to the handling of horses and mules closely resemble those under which fat cattle and other edible livestock are transported. But to that we answer in the first place that, inasmuch as the rates on fat cattle and other edible livestock were admittedly prescribed with but a minimum of regard for transportation conditions, that conclusion is a *non sequitur*, and that in addition the Commission has deliberately and willfully understated the differences between the transportation conditions relating to edible llivestock and horses and mules, respectively.

We have just seen that, in its initial report in *Livestock-Western District Rates, supra*, the Commission stated without qualification that livestock (meaning edible livestock) is a commodity which from its nature can not sustain a rate level which will produce more than the cost of rendering the service plus a minimum of profit, and further that, judged even by these standards, livestock in portions of the western district is not at present bearing its fair share of the transportation burden; also, that under the rate levels therein prescribed "it will do no more than meet these minimum requirements." Appellants readily concede that in many respects horses and mules and fat cattle move under common transportation characteristics, but it is respectfully insisted that that circumstance is without legal

significance in direct ratio to the extent that the Commission disregarded the cost of the service, in which the transportation conditions under which any commodity is transported are mirrored, in determining the level of the rates prescribed to apply on fat cattle. Even though horses and mules were transported under identically the same transportation conditions as fat cattle, to the extent those conditions are not adequately reflected in the rates prescribed on fat cattle, any similarity or identity thereof with the transportation conditions incident to the movement of horses and mules is wholly beside the point.

None the less, though, apart from and in addition to the above, appellants further maintain that the Commission in an effort to sustain its assailed rate reductions intentionally minimized the differences between the transportation conditions attendant upon the handling of horses and mules and fat cattle, respectively, as established by the uncontradicted evidence of record. Thus, on page 446 (R. 92) of its 1933 report there appears the following statement:

> "The *only* substantial transportation disadvantages of horses and mules as compared with other forms of ordinary livestock are a higher percentage of claims for loss and damage and a higher per car valuation. * * * The car revenue on horses and mules averages higher than on cattle because of higher rates and minimum weights. These factors,

> *the shippers contend*, outweigh the adverse factor of higher loss and damage claims." (Emphasis ours.)

So far as we have been able to ascertain from our analysis of the findings of the Commission upon which its assailed rate order was based, the foregoing expression affords the sole justification *from a transportation standpoint* advanced by the Commission to uphold its determination that the rates on horses and mules in the Southwest should not exceed those on beef cattle for like distances by more than 15 per cent. It will be noted that the Commission makes no finding on its own responsibility that the factors of higher rates and minimum weights outweigh the adverse factors of higher loss and damage claims and a higher per car valuation, nor does it so much as express its approval of the shippers' contention to that effect.

But, and even more to the point, the Commission has wholly ignored the fact that since the war-time period horses and mules are seldom shipped in quantities of more than two to four carloads at a time (R. 302, 380, 383, 422, 876), whereas the principal if not the only reason *from a purely transportation standpoint* offered by the Commission in justification of the inordinately low rates prescribed by it to apply on edible livestock in the western district is the fact that to a considerable extent the movement thereof is in trainload lots. For instance,

on pages 66-67 of its report in *Livestock-Western District Rates*, 176 I. C. C. 1, the Commission assigned as one of the reasons for not prescribing more than two rate levels in the western district, one east of the Rocky Mountains, roughly speaking, and the other intermediate to the Pacific coast, "the fact that livestock is more frequently offered at a single station in trainloads in plains* territory than in valley* territory." And immediately thereafter the Commission significantly added that—

> *"It follows that uniform rate territories appropriate for livestock in the western district might not be appropriate for any other commodity."* (Emphasis ours.)

This difference in volume of movement was likewise mentioned by the Commission as affording a warrant for authorizing higher rates on livestock in southern territory† than in the western district. We quote from *Livestock, Southern Territory Rates*, 171 I. C. C. 721, at pages 731-32:

> "Respondents insist that because of the wholly different character of traffic handled, and the differences in volume and the circumstances under which the traffic is handled, the rates in one territory afford no defnite guide to measure rates in

* These terms are described in a footnote on page 8 of the report in the western district livestock case.

† Southern territory roughly embraces that portion of the United States east of the Mississippi River and south of the Ohio and Potomac.

> another territory. There is merit to that contention. * * * That livestock frequently moves in trainload lots in other territories is well known. *It is reasonable to assume that this makes for lower transportation costs.*" (Emphasis ours.)

The question therefore arises as to what are the facts in respect of the trainload movement of horses and mules in the Southwest as related to that of edible livestock. Although the Commission has not seen fit to comment on that aspect of the case, the record is not silent on the subject. We first take the testimony of John C. Hicks, a witness for one of the Texas complainants. Commenting upon the reduced volume of movement that took place after the close of the war in 1918,* this witness testified (R. 302) that prior to 1919 his firm (Ross Brothers Horse and Mule Company—R. 287) had trainloads of horses out of Fort Worth over the Texas & Pacific but that since 1918 there has been no such trainload movement. Also, in the course of his testimony a witness for the defendants, F. B. Clark, said in part (R. 380):

> "On cattle, as a general proposition, the train is a solid one and therefore this unnecessary [extra?] handling at terminals is not in such a marked degree as it is on handling the single shipments of horses and mules."

* In its 1924 report (page 481) the Commission said that "From 1915 to 1918 there was an unusually large movement of horses and mules, but since then there has been a marked decrease in shipping and sales, accompanied by a decline in prices."

We do not lose sight of the fact that on page 423 (R. 69) of its 1933 report the Commission mentions the fact that the movement of horses and mules is not more than three to four per cent of the volume of the movement of edible livestock, but this only serves to lend emphasis to its omission of that highly important factor in speaking of the transportation disadvantages of horses and mules as compared with other forms of ordinary livestock. Nor can this omission be attributed to an inadvertence on the part of the majority members, for in the dissenting opinion of Commissioner Mahaffie on page 451 (R. 97) he specifically states that the class of livestock considered in the edible livestock case differs materially in transportation characteristics from the horse and mule traffic, "particularly with respect to volume and character of movement, loss and damage claims, and value per head."

It is likewise idle and beside the point to urge that horses and mules are simply one species of livestock and for that reason it is proper to base the rates thereon upon a fixed percentage relation to those on fat cattle, just as the rates fixed by the Commission on hogs, sheep, and goats bear a definite percentage relation to those on fat cattle. It was affirmatively developed in the testimony of witnesses before the Commission (R. 525, 543-44, 801, 810, 882) that horses and mules are produced and marketed for purposes wholly different from and

unrelated to those for which edible livestock is produced and marketed, and that there is no competitive relation between the two classes of livestock* except possibly to the extremely limited extent to which horses, usually old and decrepit, are sold for slaughter.

Horses and mules are primarily used as draft and work animals in the cities and on the farms, they are sold by the head, and their value is determined by their appearance and by the use to which they are put and the service which they are capable of performing. Edible livestock, on the contrary, is sold by the pound for slaughter and the prices obtained therefor are determined by its value for food purposes, in which respect it comes in market competition with live poultry and other food products rather than with horses and mules (R. 810). Moreover, it is not unusual for several movements of edible livestock to take place before the animals are slaughtered (R. 313), besides which there is an outbound movement of the products of edible livestock from the slaughtering points in the form of fresh meats, packing-house products, etc., but in the case of horses and mules the movement is ordinarily from the ranges into the primary markets, from where they go to their ultimate destination.

* It was declared by Examiner Eshelman in his proposed report (R. 956) that "There is no competition between horses and mules and edible livestock."

This identical point has been adversely passed upon by the Commission in its consideration of the rates on rice as related to the rates on other kinds of grain, such as wheat and corn. Thus, on page 9 of its report in *Lake Charles Rice Milling Co., Inc.* v. *Brimstone R. & C. Co.*, 197 I. C. C. 1, the Commission in part said:

> "Rough rice is undoubtedly a grain, and clean rice is a grain product. However, those facts do not in themselves prove that either should move on the same rates as the commodities which are termed grain and grain products. The value of clean rice is higher than the value of grain or grain products."

And as late as March 26, 1935, in *Emergency Freight Charges, 1935*, 208 I. C. C. 4, in commenting upon the contention of the shippers that rate increases on deciduous fruits without corresponding increases on citrous fruits will result in unjust discrimination, the Commission said on page 33 that "These fruits are to some extent competitive, but there has never been any recognized relationship between the rates on these two general classes of fruit." Also, in *Boardman Co.* v. *Railway Co.*, 176 I. C. C. 233, 234, mention was made of the absence of any competitive relation between agricultural and road-making implements calling for a relation of the rates thereon. Can the Commission dispense justice with an even hand and yet hold differently in respect of the rates on horses and mules as related to those

on edible livestock, at least in the absence of substantial evidence that the horse and mule traffic is subject to the same influences as those which were responsible for the inordinately low and depressed rates which it prescribed on edible livestock in the western district? We say not.

In the foregoing remarks we have dwelt at some length upon the issue relating to differences in the volume of movement, both in the aggregate and as it affects the trainload. But aside from that there are a number of other transportation differences of which no mention is made by the Commission, although developed of record. These were brought to the notice of the Commission on pages 13-14 of the petition of the southwestern carriers for reconsideration and rehearing (Exhibit XX—R. 1052-53) in the following language:

> "a) The movement of horses and mules is almost entirely in one direction, that is from the producing areas to the markets and the consuming points, whereas there is some movement of cattle, particularly of stockers, in a westerly direction from the markets to the ranges (Tr. 1016-17). This condition tends to lessen the empty movement of stock cars as respects the transportation of edible livestock."
>
> "b) The transportation and handling of horses and mules calls for the newest and best class of equipment, with high roofs which do not leak, and at unloading points for feed, water, and rest the best covered pens available must be used for horses and mules, especially during inclement weather, to avoid sickness (Tr. 1308).

"c) The movement of horses and mules is not steady but is sporadic (Tr. 1772). As was developed at the recent hearings with respect to the interterritorial rates,* the principal movement of horses and mules occurs during the Fall, when the carriers are burdened with the peak movement of traffic, particularly agricultural products."

Let us say in conclusion that the point we are here seeking to make is more than the mere drawing of inferences by an administrative body from divergent factual conditions. It involves the application of *definite standards of rate-making*—a rule of law as it were—to a given state of facts. We are not unmindful that the courts have held, and rightly so, that what the Commission does in one case in the exercise of its administrative discretion may not be used to condemn what it does in the exercise in another case of a like administrative discretion under divergent facts. Our contention, though, rests upon the application of recognized standards of rate-making which are customarily employed both by the carriers and by the Commission in testing the reasonableness of rates. Such standards are not variable but are a fixed quantity, and hence do not fall within the principle of the cases which hold that the application by an administrative board of its "flexible limit of judgment" to a given state of facts affords no criterion by

* Include J. W. Patterson v. Alabama G. S. R. R. Co. (two cases), 197 I. C. C. 591, 200 I. C. C. 766, and Fies & Sons v. Alabama G. S. R. R. Co., 201 I. C. C. 523.

which to overturn a contrary finding under another state of facts.

Point IV

The rates on horses and mules are not affected by competitive conditions such as those which have influenced the rates on edible livestock, and there is no finding by the Commission to the contrary, nor is there any substantial evidence of record to support such a finding. (R. 1126).*

Point VII

The findings of said Commission are contradictory and in conflict, (a) it being stated that the primary markets for cattle, sheep, and hogs are also the primary markets for horses and mules, whereas, so far as the Southwest is concerned, it is recognized that the flow of the traffic is mainly to the Southeast, and (b) it being declared it is illogical to prescribe rates on the horse and mule traffic unrelated to the rates on cattle, yet in other territories, as also in the 1924 decision herein as to southwestern territory, rates on horses and mules have been uniformly prescribed with no fixed relation whatsoever to the rates currently in effect on cattle (R. 1127).†

*Germane particularly to 44th assignment of error (R. 161). See also 5th and 6th grounds for relief in Amended Bill (R. 30-33).

†Germane particularly to the 43rd and 52nd assignments of error (R. 161). See also 6th, 7th, 8th, 13th, and 14th grounds for relief in Amended Bill (R. 35-40, 47-50).

These two propositions being also more or less interrelated, we shall likewise treat them jointly. On pages 446-47 (R. 92-93) of the Commission's report on further hearing in the consolidated cases there appears the following remarkable statement:

> "It is true that a low level of rates on cattle is necessary to move those animals to the primary markets, and that competitive conditions have affected those rates. But the cities which are primary markets for cattle, sheep, and hogs are also the primary markets for horses and mules. The competitive conditions which affect the rates on cattle consigned to those markets likewise must be considered in prescribing the rates on horses and mules. We conclude, therefore, that the rates on horses and mules here in issue should be related to the corresponding rates on fat cattle."

Elsewhere in the same report (page 423—R. 69) the Commission had previously pointed out that the flow of the horse and mule traffic from the Southwest is mainly to the Southeast, whereas from the western trunk-line states (which include South Dakota and Nebraska) it moves either to or through the Missouri River markets and thence to Chicago, Galesburg and cities in central territory. It is there further stated that the movement from South Dakota is almost entirely to the east, there being no movement of any consequence to the Southeast. And on page 436 (R. 82) it is pointed out that in

1918 there was no movement from South Dakota to Fort Worth or other southwestern market.

In *Livestock-Western District Rates, supra*, however, the Commission offered at pages 66-67 the ensuing explanation in support of its determination to prescribe on beef cattle in the western district only two scales of rates, one to apply uniformly throughout that portion of the western district east of the Rocky Mountains and the other to apply uniformly in the mountain-Pacific area:

> "Following are summarized some of the reasons why we find but two rate levels to be justified in the western district. The greater diffusion of livestock than of any other commodity in the western district; * * * the fact that because the trend of movement of livestock is toward a focal point in the East where all livestock or its product tends to concentrate makes every shipper an actual or potential competitor of every other shipper to a greater extent, probably, than is true of any other widely produced commodity; * * * and the intent of the law to equalize the transportation burden as between the various shippers of livestock so as to promote freedom of movement.
>
> "It follows that uniform rate territories appropriate for livestock in the western district might not be appropriate for any other commodity."

The Commission has pointed to no evidence before it to the effect that there is any such diffusion of horses

and mules as it has found is prevalent in the case of edible livestock; contrary to its finding that the movement of edible livestock is toward a focal point in the East, it has definitely stated that from the Southwest the principal movement of horses and mules is into the Southeast rather than to a focal point in the East; and there is no finding or suggestion throughout the Commission's report that the present rates on horses and mules in the Southwest are such as to restrict the freedom of movement of the traffic;—in fact, the only complaint anyone has made thereof since the present rates were prescribed has to do with the existence of the lower Kansas rates immediately to the north.

Nor does the Commission's language, when properly analyzed, carry with it a finding that the rates on horses and mules are subject to the same competitive conditions by which the rates on cattle are affected. Note the peculiar phraseology employed by the Commission: "The competitive conditions which affect the rates on cattle consigned to those markets likewise *must be considered* in prescribing the rates on horses and mules." This sentence is shrewdly worded so as to convey an implication which would support the immediately following conclusion "that the rates on horses and mules here in issue should be related to the corresponding rates on fat cattle." But unless the same, or substantially the same, competitive conditions affect both horses and mules and

edible livestock, and the Commission makes no finding that they are, then the structure upon which the ensuing conclusion is meant to rest collapses because of its own weakness, and the conclusion itself falls to the ground. We see no escape from this proposition, and we trust that the Court will note carefully the misleading inference which the Commission has sought to convey by its artful wording of the passage in question.

In the same paragraph on page 446 (R. 92) of its 1933 report there appears the unqualified declaration that "It is illogical to prescribe rates on this traffic [horses and mules] unrelated to the rates on cattle, when the rates on hogs, sheep, and all other ordinary forms of livestock are based on the fat-cattle rates." We have already had occasion to point out that the purposes for which horses and mules are produced and marketed are altogether different from those for which cattle and other forms of edible livestock are produced and marketed, that the one species of livestock does not come into competition in the markets with the other, and also that the analogy of transportation conditions under which the two species of livestock are respectively transported, although largely similar, are by no means identical, this being particularly true as respects the volume of movement, both in the aggregate and in the movement in trainload lots.

So why, we ask, is it illogical to prescribe rates on horses and mules unrelated to the rates on cattle? This is what might well be termed a fixed principle, and if it is sound it should apply equally in one locality as in another. Surely, if it is illogical to prescribe rates on horses and mules in the Southwest or in the western district unrelated to the rates on cattle, it being recognized that the volume of the horse and mule movement in the western district is only some three or four per cent of that of the edible livestock movement, for stronger reason it should be illogical not to relate the rates on the former to the latter in other sections where this disparity of movement is less pronounced. But on page 443 (R. 89) of its 1933 report herein, after stating in so many words that "no uniform relation exists" between the horse and mule scale and the cattle scale approved by it in *Livestock, Southern Territory Rates, supra*, the Commission tabulates each of those scales for selected distances ranging from 100 to 1000 miles and recites the percentage that the horse and mule rates in that section bear to the cattle rates for each distance, such ratios ranging from a minimum of 115.3 to a maximum of 147.3, or an average of 122.5.

Again, on page 439 (R. 85) of its 1933 report, the Commission has tabulated the basic rates prescribed to apply on edible livestock in central territory (which embraces, roughly speaking, the States of Illinois, In-

diana and Ohio) in *Eastern Livestock Cases of 1926*, 165 I. C. C. 277, for selected distances ranging from 50 to 800 miles. These edible livestock rates bear no fixed percentage relation to the first-class rates prescribed to apply in that territory, see *Eastern Class Rate Investigation*, 164 I. C. C. 314, 467. To illustrate this, we submit in the following tabular statement a comparison of the C. F. A. first-class rates for the distances used by the Commission with the central territory cattle rates for corresponding distances, together with the ratios that the latter bear to the former:

Distance (Miles)	C. F. A. First-class Rate (Cents)	C. F. A. Cattle Rate (Cents)	Ratio of Cattle Rate to First-class rate
50	43	14	32.56
100	56	19	33.93
200	73	24	32.88
300	87	29	33.33
400	99	34	34.34
500	111	39	35.14
600	123	43	34.96
700	135	46	34.07
800	145	49	33.79
Average - - - -	96.89	33	34.06

In prescribing rates on horses and mules in central territory, though, the Commission has seen fit to put same upon the class rate basis rather than to fix them with any definite relation to the cattle rates. Thus, on page 441 (R. 87) of its report on further hearing it is stated that in eastern territory, which includes central territory, the fourth-class rates, or 50 per cent of first

class,* have been prescribed to apply on horses for slaughter, and in more recent decisions, *Galesburg Horse & Mule Co.* v. *Akron, C. & Y. Ry. Co.*, 196 I. C. C. 739, decided October 21, 1933, *Patterson* v. *Alabama G. S. R. R. Co.*, 197 I. C. C. 591, decided December 2, 1933, *Thompson* v. *Baltimore & O. R. R. Co.*, 198 I. C. C. 540, decided January 19, 1934, *Grand Island Livestock Commission Co.* v. *Railway Co.*, 205 I. C. C. 267, decided November 27, 1934, and *Crandall Horse Co.* v. *Railroad Co.*, 206 I. C. C. 209, decided January 24, 1935, the Commission has extended the application of the fourth-class basis in central territory to the horse and mule traffic generally.

Accordingly, since the horse and mule rates now definitely prescribed in central territory are on the class basis, to which the central territory cattle rates bear no fixed percentage relation, it follows that, notwithstanding its declaration in the western case that it is illogical not to relate the rates on horses and mules to those on cattle, the Commission has not "practiced what it preaches" in subsequently prescribing class rates on horses and mules in central territory.

Moreover, the rates prescribed or authorized by the Commission in 1924 and 1925 to apply on horses and mules in the Southwest bear no fixed percentage relation

*The class A rates proposed by appellants for the future in the Southwest, but rejected by the Commission, are only 45 per cent of first class.

to the rates on cattle or other edible livestock in southwestern territory. The Commission indeed rejected at that time the contention of the complainants that for distances under 500 miles the horse and mules rates should not exceed those under the cattle scale by more than 15 per cent, mention of which appears on pages 482 and 487 of its 1924 report. Evidently, it was not considered illogical then not to prescribe rates on horses and mules unrelated to those on cattle in the Southwest, yet the Commission points to no circumstance or change of conditions in the meanwhile which has served to support the contrary conclusion later expressed in its 1933 report. Moreover, in 1925 the Commission authorized the carriers to add to the basic rates on horses and mules prescribed in 1924 specified arbitraries for that portion of the hauls of such traffic in Texas differential territory and New Mexico, notwithstanding the fact that there were no differentials on cattle, for, as stated on page 490 of the 1924 report, "the present southwestern cattle scale applies quite generally from points in the Southwest, including points in eastern New Mexico and Texas differential territory."

Since the Commission did not find it illogical in 1924 and 1925 to make rates on horses and mules unrelated to the corresponding rates on cattle, it is passing strange that in 1933 it had become illogical to do so;—certainly, to support this change of mind on its part, it was in-

cumbent upon the Commission to make some basic finding or to offer some reasonable explanation as to what supervening change of conditions was responsible for its altered viewpoint on this angle of its decision.

Point VI

The Commission's finding that only the better grades of horses and mules find their way to the stock markets is contradicted by affirmative evidence of record (R. 1127).*

The above finding of the Commission,—which first appears near the bottom of page 424 of its 1933 report and is then reiterated at the bottom of the following page (R. 70, 71) and, as will be noted below, goes to the heart of the issue of what the traffic will bear,—was made in an attempt to negative the import of evidence that wide differences prevailed between the values of horses and mules on the farms and at the stock markets, which it was urged on behalf of the carriers (*e.g.*, see R. 763, 765, 806-7, 809-10) shows that the value of the transportation service performed by them was far in excess of the charges which they were receiving therefor. Such finding is wholly uncorroborated by the evidence before the Commission, however, and is in direct conflict with the

*Germane particularly to 13th and 49th assignments of error (R. 156, 161). See also the 15th ground for relief in Amended Bill (R. 50).

uncontradicted testimony of the complainants and of witnesses in their behalf, as will be noted by the following excerpts therefrom:

> "The class of horses that we generally ship to the South is what is called a southern horse; that is, a tidy, nice, trim, pretty, little animal, not so little either, a horse that would weigh from 800 to 1100 pounds." Witness D. H. Robertson (R. 260-61).

> "I have known of instances in the past where part of a car of horses and mules have failed to sell on the market for their proportion of the freight charges assessed on the car. On several occasions there have been horses shipped in a carload where they would bring $2.50, some of them $4.00, and some of them $6.00, while the freight per head was more than the amount they brought on the market. That is what is known on the market as a plug horse. I would not say that happens frequently, but it does occasionally happen. The animal was alive but I have known of them being blind; there is not so much service left in them, they would be thin or something would be wrong with them, some unsoundness. Range horses will run today all the way from $7.50 up to around $45.00." Witness Robert A. Nash (R. 499).

> "The higher classes of horses, such as draft animals, are shipped to market, but not to western markets so much. There is not as large a percentage of those sold that are shipped to market as there is of these chunks and cheaper grades of horses." Witness Robert A. Nash (R. 502).

> "We have a classification called southern horses, which are small, 900 to 1100 pounds, on the breedy

type. They are cheaper than the chunks but are serviceable work horses. They now range in price from $30.00 to $60.00, and they constitute a relatively important part of our consignments, and that would help to bring this figure down to $45.00." Witness Robert A. Nash (R. 503-4).

"Horses and mules are listed in the same category as horses, but there are relatively few of the higher valued mules in South Dakota, and the horses, particularly that portion which is shipped from the State, are largely of a very low grade." Witness S. W. Carr, representing the South Dakota Railway Commission (R. 626).

"There is quite a variation between different classes of horses but on most of the horses shipped out of our territory the prices are very low." Witness D. L. Kelley, representing the Board of Railroad Commissioners of the State of South Dakota (R. 798).

"I think the prices of mules right now are pretty near as low as $68.60 per head. * * * All kinds of mules reach the Kansas City market." Witness J. H. Tedrow, Transportation Commissioner of the Kansas City Chamber of Commerce (R. 805).

Reference is additionally here made to Exhibit C-352 (R. 891-93), wherein is reproduced the testimony of witnesses in No. 24674, J. W. Patterson Commission Company, complainant, that the average weight of the horses and mules involved in that proceeding did not exceed over 900 pounds per animal. We likewise quote as fol-

lows from page 769 of the Commission's report in a companion case, No. 25710, *Patterson* v. *Alabama G. S. R. R. Co.*, 200 I. C. C. 766:

> "The animals comprising the shipments on which reparation is sought in the *Meridian cases* are comparatively light in weight and are known as Texas range horses and mules. The weights of the animals originating in Fort Worth range from 750 to 850 pounds, whereas those originating at other points range from 600 to 700 pounds. Scale weights procured on 26 carloads show that the animals average 715.77 pounds each, or an average per car weight of 22,692 pounds."

We are not in a position to offer any conjecture as to what extent the rate reductions required by the Commission were influenced by this clearly unsupportable finding of the Commission, but since its assailed order was in part based thereon we submit that such order is thereby so tainted as to render it invalid. We do say, though, that the evidence by which such finding was prompted clearly sets the horse and mule traffic apart from the edible livestock traffic on the question of the economic need for low rates to permit the free movement thereof.

Point VIII

The findings of said Commission whereby its previously prescribed rates on horses and mules in southwest-

ern territory were condemned having been palpably influenced by the existence elsewhere than in southwestern territory, particularly in the States of Kansas and Nebraska, of intrastate rates on horses and mules pointedly declared by it to be subnormal, said Commission thereby abdicated the functions and duties conferred upon it by law and its orders entered in pursuance thereof are illegal, invalid and useless (R. 1127).*

Point IX

In the absence of any evidence or finding that transportation conditions in southwestern territory are substantially identical to those in western trunk-line territory, and in particular to the territory in issue in Docket Nos. 12248 and 13273 (the South Dakota and Nebraska cases), and in the face of its repeated declarations, supported by affirmative evidence of record herein, that transportation conditions in southwestern territory are more onerous than in western trunk-line territory, the order of said Commission compelling appellants to reduce their rates on horses and mules in southwestern territory to the level concurrently prescribed as just and reasonable for observance on such traffic

*Germane particularly to 12th, 47th and 48th assignments of error (R. 156, 161). This proposition indirectly grows out of the 8th ground for relief in the Amended Bill (R. 38-40).

in western trunk-line territory evinces a total disregard of the transportation standard and hence is void, invalid, and useless (R. 1128).*

In 1924 and 1925, as we have seen, before the *South Dakota* and *Nebraska cases* were consolidated by the Commission in 1926 with the strictly southwestern cases, and when the rates prescribed by the Commission to apply in the Southwest were formulated in the light of evidence relating only to the southwestern rate adjustment, the Commission laid down a basic scale of rates on horses and mules for that territory which presumably afforded full recognition of the facts and circumstances appertaining to the horse and mule traffic in that section, and it also authorized the carriers to add to the basic scale specified arbitraries for that portion of the hauls in Texas differential territory and eastern New Mexico. The basic rates so prescribed did not bear any fixed percentage relation to the southwestern cattle rates, but rather the Commission chose as the pattern therefor a scale of rates which it had previously devised to apply on bags, potatoes and soap.

It was not until after the southwestern cases were in 1926 reopened for further hearing in response to a joint petition of the Public Service Commission of Kansas and the Chamber of Commerce of Kansas City (R. 65)

*Germane particularly to 11th, 16th, 33rd, and 48th assignments of error (R. 155, 157, 160, 161). See also 8th ground for relief in Amended Bill (R. 38-40).

alleging that a lower level of rates should be prescribed in the Kansas-Missouri territory than that found reasonable and proper for the Southwest generally;—it was not until after the *South Dakota* and *Nebraska cases*, in which rates on horses and mules not to exceed 115 per cent of the corresponding rates on fat cattle were prescribed in the light of conditions prevailing in that section of the country, were reopened by the Commission on its own volition for further hearing along with the southwestern cases;—it was not until after a further hearing was held jointly or "coöperatively" with the Kansas Public Service Commission* (R. 65, 485) with regard to the level of rates on horses and mules appropriate for Kansas;—it was not until after the Commission, ostensibly because of the severe economic distress of that industry and because of other facts and circumstances peculiar thereto, reached the conclusion in *Livestock-Western District Rates, supra*, that uniform scales of rates on edible livestock should be prescribed to apply throughout that portion of the western district, roughly speaking, between the Mississippi River and the Rocky Mountains,—that the Commission became imbued with the idea that just and reasonable rates on horses and mules in the Southwest might not properly be maintained on a higher plane than those concurrently fixed

*These co-operative proceedings with the State commissions are commented upon and the basis therefor is explained on pages 8-9 of the Commission's 36th Annual Report, dated December 1, 1922, and in Appendix H thereto (pages 231-34).

by it as just and reasonable in western trunk-line territory upon a consideration of the facts and circumstances there prevailing.

As affirmatively disclosed by the record in the consolidated cases, there was no economic distress prevailing in the horse and mule industry such as that which the Commission had found to exist in the edible livestock industry. As also disclosed of record, the horse and mule traffic had moved as freely in the Southwest on the rates prescribed and authorized in 1924 and 1925 as it was moving in the western trunk-line territory on the lower rates therein prevailing. But in the face of the finding on page 432 (R. 78) of its 1933 report herein that "The subnormal character of the intrastate rates in the States named [Kansas, Missouri, and Nebraska] is also apparent," the Commission, although recognizing (R. 93) that to do so "would result in reductions in the considered rates on horses and mules from, to, and between points in the Southwest," nevertheless prescribed in its 1933 report and order the same basis of rates to apply on horses and mules in the Southwest as at the same time fixed as just and reasonable for observance in western trunk-line territory on the north.

The rates on horses and mules from points in Kansas to the Missouri River markets of Kansas City and St. Joseph, Mo., and Leavenworth and Atchison, Kans., are the Kansas statutory rates which originally became ef-

fective on May 29, 1909, as modified by the subsequent general increases of 1918 and 1920 and by the 1922 general reduction (R. 575-76, 713), this for the reason *(ibid.)* that each of these points is in direct competition with the others, and to increase the interstate rates to the two Missouri markets without a corresponding increase of the intrastate rates to Leavenworth, Atchison, and Kansas City, Kans., would give rise to a discriminatory adjustment. Likewise, the intrastate rates in Missouri (R. 541-42) were reduced by statute on or about July 12, 1913, but the Public Service Commission of Missouri authorized an increase of such statutory rates which became effective in July, 1917, and in *Dimmitt-Caudle-Smith Livestock Commission Co.* v. *Railroad Co.*, 47 I. C. C. 287, decided November 12, 1917, interstate rates on horses and mules were prescribed to apply from points in Missouri to the National Stockyards in East St. Louis, Ill.

It is obvious from the foregoing that such intrastate rates in these western trunk-line States, the subnormal character of which the Commission declares is apparent, exerted a profound influence upon the general level of the interstate rates on horses and mules in that section of the country. The rates on horses and mules in the Southwest that were prescribed or authorized in 1924 and 1925 did not reflect the depressing influence of these statutory intrastate rates in western trunk-line

territory, and it was only when the consolidated proceedings were broadened in 1926 to take into account the western trunk-line rate adjustment that the Commission found any occasion or necessity to condemn and overturn the southwestern horse and mule rates formerly declared by it to be just and reasonable.

Appellants therefore respectfully maintain that the Commission abdicated the functions and duties conferred upon it by law of prescribing just and reasonable rates in a given section which reflect the circumstances and conditions relating thereto by requiring appellants, upon consideration of the circumstances and conditions attendant upon the rate adjustment in an altogether different and lower rated territory, to reduce their previously prescribed or authorized rates to a substantially lower level.

Appellants further lay down the proposition that in its reported decisions the Commission has repeatedly recognized the existence of more onerous transportation conditions in the Southwest than in western trunk-line territory, and that in the absence of an essential jurisdictional finding of some material fact or circumstance appertaining to the horse and mule traffic to support its action in doing so the Commission's findings and order fixing the same maximum reasonable rates on horses and mules in the Southwest as those contempo-

raneously prescribed to apply in the normally lower rated western trunk-line territory are arbitrary and illegal, and hence a nullity.

We submit that this involves more than the mere exercise of administrative discretion in the fixing of just and reasonable rates. We do not say that the Commission may not lawfully require that the same rates shall be observed in a given rate group having less favorable transportation characteristics than another, but we do say that for such a requirement to be legally valid it must be supported by an appropriate finding of some relevant fact or circumstance which will impart validity thereto. We take the position that it is not within the power of the Commission by arbitrary fiat to disregard substantial differences in the transportation characteristics of one rate territory in relation to those of another; to support its action in disregarding such differences it must offer some legally acceptable justiifcation therefor.

That southwestern territory ordinarily requires a higher level of rates than western trunk-line territory, due to more favorable transportation conditions in the latter than in the former, is well settled by repeated decisions of the Commission, some of them of more recent date than its report and order herein under review. One of such decisions has heretofore been considered by this Court in *Beaumont, S. L. & W. Ry. Co.* v. *United*

States, 282 U. S. 74, in which the southwestern carriers assailed the order of the Commission in *Divisions of Freight Rates*, 148 I. C. C. 457, whereby a readjustment of the divisions of the rates on interterritorial traffic between the Southwest and western trunk-line territory were required. In that case, after reviewing the various factors bearing upon the subject the Commission on page 475 of its report announced its general conclusions in the following language:

> "The effect of these figures is to indicate that the cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent greater in the Southwest than in the western trunk-line group, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent greater based on 1924 operations."

In *Western Cement Rates*, 48 I. C. C. 201, as indicated by the map facing page 247, the Commission prescribed three scales of rates on cement to apply in western trunk-line territory, Scale II, the lowest, being employed in the eastern part of that area, and Scale IV in the western part, with Scale III in between; and in subsequent reports in that proceeding, e.g., 69 I. C. C. 644, it was provided that the average of the scales would apply on shipments from points in one group to those in another, thereby making the applicable rate from the Scale III

group to the Scale IV group an average of the Scale III and Scale IV rates, as indicated on pages 658-59. The Commission later projected the Scale III cement rates into the eastern portion of southwestern territory and the Scale IV rates into the western portion thereof, with provision that on shipments from points in the Scale III group to the Scale IV area in western Texas the Scale IV rates (rather than the average of the Scale III and Scale IV rates) should apply. See *Iola Cement Mills Traffic Assn.* v. *Railway Co.*, 87 I. C. C. 451; *Oklahoma Portland Cement Co.* v. *Railroad Co.*, 128 I. C. C. 63; *Iola Cement Mills Traffic Assn.* v. *Railway Co.*, 144 I. C. C. 585. Thus, the Scale II rates were not extended into the Southwest at all, and the average of the Scale III and Scale IV rates on shipments into Scale IV territory was adopted in the Southwest only as to Scale IV territory in the western part of Oklahoma, 87 I. C. C. 451.

In *Western Trunk-Line Class Rates*, 164 I. C. C. 1, as will be noted from the map facing page 248, the Commission somewhat similarly divided western trunk-line territory into three class-rate zones, with a sub-zone in the eastern part of Wyoming, although in a supplemental report in that proceeding, 204 I. C. C. 595, rendered October 9, 1934, it was provided that this sub-zone should be designated as Zone IV. In the Southwest, however, by a supplemental report rendered in *Consolidated South-*

western Cases on November 22, 1934, 205 I. C. C. 601, the Commission has directed that the eastern portion of the Southwest shall hereafter be designated as Zone III and the western portion thereof heretofore referred to as differential territory shall be designated as Zone IV (see map following 123 I. C. C. 479). It will be noted, 204 I. C. C. 709-10, 205 I. C. C. 673-74, that the Zone III rates prescribed to apply in western trunk-line territory are the same as the Zone III rates which the Commission has now prescribed to apply in the eastern portion of the Southwest, and that the Zone IV rates which are applied in the eastern part of Wyoming have been adopted for application in that portion of the Southwest which formerly was known as Texas-Oklahoma differential territory. Neither the Zone I nor the Zone II rates are to be applied in the Southwest except as the basis for determining interterritorial rates on traffic moving into or from the Southwest through the lower rated territory.

But even more recently, in its report on further hearing* in the so-called *Western Grain case*, 205 I. C. C. 301, rendered October 22, 1934, the Commission prescribed basic rates on grain and grain products in the Southwest which were estimated by Commissioner Splawn in his dissenting opinion (page 484) to average at least 130 per cent of the level prescribed in western trunk-line

*Consequent upon the overturning of its first decision in Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248.

territory (see also the discussion of the southwestern rates in relation to the western trunk-line rates on pages 360-65 of the majority report).

The fact is that, apart from its decision in *Livestock-Western District Rates, supra*, we do not call to mind a single instance where the Commission has seen fit to prescribe a uniform level of rates throughout the vast area of the western district lying east of the Rocky Mountains. And even in that case, as previously remarked, the Commission painstakingly outlined the extraordinary conditions peculiar to that traffic which were directly responsible for its departure from the general relative rate adjustment in that regard, and was careful to point out (page 69) that "uniform rate territories appropriate for livestock [but speaking only of edible livestock] in the western district might not be appropriate for any other commodity."

We have seen that in prescribing class rates and cement rates the Commission in consideration of differences in transportation conditions has subdivided western trunk-line territory into three and four differently rated zones, and the Southwest has likewise been divided into two zones, yet in the case of the horse and mule rates these differences in transportation conditions have been ruthlessly thrust aside and a uniform scale of rates prescribed to apply on that traffic throughout all that portion of the western district east of the Rocky Moun-

tains. For that matter, following its customary rule-of-thumb practice the Commission (Division 2) has only recently in No. 26086, *Harry A. Crowley* v. *Railway Co.*, 206 I. C. C. 221, decided January 24, 1935, extended to shipments of horses and mules from certain points in Arizona and New Mexico to specified destinations in California the 115 per cent rate relation to the corresponding fat cattle rates, one member of the Division dissenting on the ground that the prescribed minimum weight of 23000 pounds is less than the minimum of 24000 pounds prescribed to apply on shipments of fat cattle in mountain-Pacific territory.

Certainly, in the absence of a basic finding supported by substantial evidence to justify its departure from the recognized practice of prescribing rates in the Southwest on a higher level than in western trunk-line territory, and there is none, the order of the Commission unsupported by such essential basic finding and evidence must needs be taken as nothing more than an arbitrary administrative fiat, and in consequence be held to be null and void.

Point X

The order of the Commission compelling appellants to apply as reasonable maxima in southwestern territory rates on horses and mules which are lower, both relatively and absolutely, than those prescribed

by it as just and reasonable in other rate groups where operating conditions are notoriously more favorable than in southwestern territory, and have been repeatedly so recognized by it, evinces a disregard by it of the transportation standard and hence is wholly void, illegal, and useless. (R. 1128.)*

This proposition is more or less akin to the one immediately preceding, in that they both relate to the arbitrary nature of the Commission's action in prescribing rates on horses and mules in the Southwest in utter disregard of the recognized existence of less favorable transportation conditions in that section than in other coördinate rate groups.

Thus, we have seen that in a number of recent decisions the Commission has definitely adopted the fourth-class rates (50 per cent of first-class) as just and reasonable for observance on shipments of horses and mules between points in central territory, and that in *Livestock, Southern Territory Rates, supra*, it approved the so-called compromise scale of rates prevailing in southern territory, which for representative distances is set out on page 443 (R. 89) of its 1933 report herein.

* Germane particularly to 52nd and 56th assignments of error (R. 161). See also the 8th and 13th grounds for relief in Amended Bill (R. 38-40, 47-48).

For ready reference, we reproduce below a statement of the rates on horses and mules in the Southwest prescribed in the Commission's 1933 report and order, on either side flanking same with the corresponding central territory fourth-class rates prescribed in *Eastern Class Rate Investigation*, 164 I. C. C. 314, 467, 171 I. C. C. 481, 498, and with the corresponding southern territory rates on horses and mules, viz.:

PRESCRIBED RATES ON HORSES AND MULES

Distance (Miles)	Central Territory Rates	Southwestern Territory Rates	Southern Territory Rates
100	28c	23c	28c
200	37c	31c	37c
300	44c	37c	44c
400	50c	42.5c	48c
500	56c	48.5c	53.5c
600	62c	53c	56.5c
700	68c	57.5c	61.5c
800	73c	62c	65.5c
900	78c	66.5c	68.5c
1000	83c	71.5c	72c

Bearing in mind the fact that the prescribed rates on horses and mules in the Southwest are substantially lower than those fixed or approved as just and reasonable in central and southern territories, let us now review a few of the comments which the Commission has made in the past with regard to the relative transportation characteristics and rate levels of these three distinct rate groups.

On page 382 of its initial report in *Consolidated Southwestern Cases*, 123 I. C. C. 203, there appears the following:

> "Southern territory adjoins the Southwest on the east. The two territories lie side by side for a distance of practically 500 miles. • • • In numerous previous cases we have recognized that rates in the Southwest may properly be somewhat higher than in southern territory."

We next refer to the following observation in *Arkansas Railroad Commission* v. *Railroad Co.*, 153 I. C. C. 371, at pages 376-77:

> "The majority of the comparisons introduced by the parties are with rates in official and southern territories, both of which have generally been recognized by us as lower-rated territories than the Southwest."

Again, in *Small* v. *Railway Co.*, 163 I. C. C. 163, we find on page 164 the following:

> "The scale of first-class rates in southwestern territory is approximately 110 per cent of the scale of first-class rates in southern territory. This is in keeping with the generally recognized fact that transportation conditions in the Southwest warrant a higher level of rates than in southern territory."

To the same effect is the Commission's statement in *Cline & Bernheim* v. *Railway Co.*, 163 I. C. C. 365, 367, that "we have frequently found that higher rates are justified in the Southwest than in southern and official territories." And lastly, in his dissenting expression in *Western Trunk-Line Class Rates*, 164 I. C. C. 1, Commissioner Porter declared at the top of page 231 that—

> "The southwestern first-class rates average approximately 154 per cent of the average first-class rates in central territory prescribed in the *Eastern case.*"

Surely, in the face of these categoric expressions, it should take more than the unsupported fiat of the Commission to justify its order requiring appellants to establish lower rates on horses and mules in the Southwest than those held by it to be just and reasonable in the normally lower-rated central and southern territories. We fully appreciate the fact that on certain commodities, such as edible livestock, petroleum, and grain and grain products, because of traffic and transportation incidents peculiar to that traffic, including large volume of movement, together with the ability of the traffic in the case of petroleum oil to move by pipe line, and the heavy per-car loading of grain, the Commission has prescribed rates on a lower plane in the Southwest than those prevailing in central and southern terri-

tories, but the point is that in each instance it has felt constrained to explain fully the reasons which prompted it to depart from the course customarily followed in that regard. For that matter, since such a large proportion of their traffic consists of commodities which move on these subnormal rates, because of their having to rely largely on other kinds of traffic for their revenues (R. 883), it is essential that the southwestern carriers be permitted as far as possible to obtain relatively higher rates on so much of the traffic which they handle that remains. This obviously is a mathematical certainty.

None the less, though, without regard for the fact that the practical experience of eight or nine years therewith clearly demonstrated that the rates prescribed or authorized in 1924 and 1925 did not preclude the free movement of the traffic, and without offering any justification therefor other than the fact that in the *South Dakota* and *Nebraska cases* the 115 per cent relation to the fat cattle rates had been adopted, the Commission by prescribing that relation in its assailed 1933 order unnecessarily compelled appellants to reduce their rates on horses and mules in the Southwest to a level substantially below that found proper by it to apply on that traffic in that portion of the United States east of the Mississippi River where it is commonly accepted that more favorable transportation conditions prevail. We

are unable to persuade ourselves that this Court will hesitate to denounce such action on the part of the Commission as an unwarranted abuse of its administrative discretion.

Point XI

The Commission having in 1925 authorized appellants to assess a higher level of rates on horses and mules in Texas differential territory than in southwestern territory generally, based upon a finding of the existence of more onerous transportation conditions in the former area than in the latter, and there being in its 1933 report no finding that any change in the relative transportation conditions in these two rate groups has occurred since its prior finding was made, its assailed order whereby appellants have been compelled to reduce their rates on horses and mules in Texas differential territory to the basis prescribed as just and reasonable for application on shipments of horses and mules in southwestern territory generally manifests a total disregard for the transporation standard and hence is void, illegal, and useless (R. 1128-29).*

In 1925, following an exhaustive hearing with exclusive regard to the rates and transportation condi-

*Germane particularly to the 17th and 53rd assignments of error (R. 157, 161). See also the 12th ground for relief in Amended Bill (R. 39-41).

tions in differential territory and eastern New Mexico (R. 393-478, 1151-56), in *Rates on Horses and Mules in the Southwest*, 102 I. C. C. 87, the Commission found justified the addition to the basic rates prescribed in 1924 of specified arbitraries for that portion of the hauls of the horse and mule traffic in Texas differential territory and eastern New Mexico. The following summary of the evidence upon which such decision was based is taken from page 89 of the report therein:

> "Transportation conditions in differential territory and in New Mexico are substantially less favorable than in southwestern scale territory. In general, differential territory and New Mexico are semiarid, of comparatively rough topography, and sparsely settled. Agricultural production is largely dependent upon irrigation, which is not greatly developed. Compared with the territory to the east, differential territory and New Mexico receive and forward per mile of line but a small amount of freight. The main lines of the trans-continental carriers through this section handle a considerable volume of 'overhead' or through traffic, but the record indicates that in the case of at least one carrier, the Texas & Pacific, its through traffic diminished substantially with the increase of tonnage through the Panama Canal. The record contains numerous data with respect to the relative density of population and traffic in differential territory and New Mexico, the more difficult operating conditions in that section, and the financial needs of the carriers therein. There is also evidence covering the comparatively greater expense of handling livestock traffic

> than dead freight. In general, the facts presented by respondents along these lines have been recognized by us in numerous cases and need not be reiterated here."

By the Commission's 1933 report and order, though, not only were appellants disallowed the differential territory arbitraries previously authorized, but they were compelled to reduce their interstate rates on horses and mules in Texas differential territory and eastern New Mexico to the even lower plane coincidently prescribed to apply in the Southwest generally than that which had prevailed following the 1924 decision. But there is not the vestige of a finding in the Commission's 1933 report that there had in the meanwhile occurred such an improvement of transportation conditions in Texas differential territory and eastern New Mexico as would justify the severe rate reductions so imposed upon appellants, or that from a relative standpoint there had been such improvement of transportation conditions in Texas differential territory and eastern New Mexico as to warrant the maintenance of identically the same rates in the former as in the latter. We quote from page 445 (R. 91) of the Commission's 1933 report its further findings on this point:

> "The evidence dealing with these questions, particularly with Texas and New Mexico differential territory, is comprehensive and detailed. Except as

supplemented or modified at the further hearing, the proposed report of the examiner contains a detailed statement and discussion of the facts in the light of the contentions of the parties. Much of the evidence is the same as or similar to that introduced and considered in *Live Stock—Western District Rates, supra.* Upon an exhaustive record in that proceeding we fixed, among other things, scales of rates on cattle and other edible livestock to apply uniformly within the western district of the United States lying east of the Rocky Mountains. That district embraces the territories under consideration in the cases covered by the instant proceeding. The evidence presented dealing with the above questions is convincing that the finding made respecting the rates on livestock is proper, and that a similar finding should be made here. We conclude, therefore, that the scale of rates hereinafter fixed should apply uniformly throughout the territory covered by these consolidated cases."

This leads us to a consideration of what was said in the western district livestock case with respect to the differential situation. That appears on pages 53-55 of that report, and a perusal thereof will disclose that such discussion was limited to a review of operating costs submitted by the Texas & Pacific for the year 1926. So far as we may ascertain from its report, the Commission had no additional evidence before it on the subject. (Appellants do not say there was not other evidence before it; the thought suggests itself, though, that if there was then a full and impartial review thereof would have

compelled it to abandon its plan to prescribe uniform rate scales on edible livestock.)

As stated in the report, these operating data purported to show that on the Texas & Pacific it costs 36 per cent more to carry a ton of freight one mile in differential territory than in Texas common-point and Louisiana territories (the Texas & Pacific extends from the Mississippi River at New Orleans across the States of Louisiana and Texas to El Paso), but this showing was dismissed by the Commission with the statement that "the data indicate that while the average gross tons of trainload are 31.7 per cent greater, and the net tons of trainload 59.6 per cent greater in common-point territory and Louisiana than in differential territory, this is due in part, at least on some of the trains, to the use of locomotives of 42 per cent greater tractive power, as well as to the more favorable grades and operating conditions." The Commission then adds that such data "afford no basis for a definite determination of relative costs in the two territories because in reality they deal only with relative train costs per unit, and afford no information as to other costs."

While it is not our purpose to argue before this Court the weight of the evidence in question nor to point out the fallacies in the criticism thereof, we do feel constrained to say that anyone with an open mind should be forcibly impressed with the thought that trains carry-

ing in one territory 59.6 per cent more revenue-bearing freight must necessarily be operated at a lower cost per net ton-mile than trains in another territory where grades and operating conditions are less favorable, regardless of whether the same or different classes of locomotives are used on the respective parts of the line. For that matter, the Commission, when not obsessed with a determination to prescribe a uniform rate level throughout a vast area, as it was in the edible livestock case and in the case at bar, has itself viewed this identical evidence in quite a different light and in consequence has arrived at a diametrically opposite ultimate conclusion.

Thus, in its Nineteenth Supplemental Report in *Consolidated Southwestern Cases*, 196 I. C. C. 507, rendered October 4, 1933, but little more than two months after its 1933 report herein was handed down, after setting out the testimony of a civil engineer of the Texas & Pacific that every freight train east of Big Spring (which point then separated common-point territory from differential territory on that line as to the rates on horses and mules) has on the average 60 to 61 per cent more earning capacity in vendible transportation than freight trains running west of Big Spring, and that it cost in fact 36 per cent more in 1926, 46.3 per cent more in 1927, and 40.3 per cent more in 1928 to carry a ton of freight one mile in differential than in com-

mon-point and Louisiana territory,* the Commission thereupon announced the conclusions drawn by it therefrom as follows:

> "We appreciate that it is impossible to make a study of this character that would be wholly free from just criticism, especially because many assumptions and arbitrary allocations of costs necessarily must be made. Although we can not accept the study as showing the true unit costs or the precise differences in costs as between differential and common-point territories, it does tend to prove that the costs in the former are relatively higher than in the latter."

The aforesaid Nineteenth Supplemental Report was devoted almost exclusively to the review and consideration of a large volume of evidence relating exclusively to the differential territory rate adjustment,† the result being, as announced on page 526, that the Commission declined to abolish the differentials therein under attack but ordered that the rate level in differential territory on the traffic therein under review be reduced from 120

*Identically the same evidence for the years 1926 and 1927 as that so set out by the Commission was presented (R. 741-42) at the 1928 hearing in these proceedings by witness R. G. Waggener, Assistant Engineer for the Texas & Pacific Railway Company and a Member of the American Society of Civil Engineers (R. 728).

†It may be remarked in this connection that much, and perhaps most, of the economic data outlined in the paragraph on the lower half of page 511 of said Nineteenth Supplemental Report in Consolidated Southwestern Cases are embodied in Exhibit C-323 identified herein by witness C. D. Bordelon (R. 862-65), which, however, has not been reproduced in the printed record.

to 115 per cent of the basic class and commodity rates in southwestern territory.

The evidence of record herein dealing with the differential territory situation covers quite a wide range and was discussed by numerous witnesses, whose testimony was supported by many exhibits, some of them quite voluminous and detailed. Apart from the evidence presented at the 1925 hearing in I. & S. Docket No. 2389 (R. 393-478, 1151-56), among the witnesses who dealt with this feature of the case at the 1928 and 1932 hearings were the following: For the complainants, B. D. Pelton (R. 603-12); for the carriers, F. A. Swenson (R. 680-83); B. F. Seggerson (R. 691-97); C. A. Casler (R. 702-5); G. A. Ryser (R. 705-11, 874-80); B. M. Gillespie (R. 712-13); M. J. Dowlin (R. 717-27, 856-59); R. G. Waggener (R. 728-45); C. D. Bordelon (R. 861-70); W. T. Long (R. 873-74). The comparative data presented by the foregoing witnesses cover a wide range, including such matters as differences in density of population and traffic, operating costs, and topographic, climatic and economic conditions, much the same as that reviewed by the Commission in its Nineteenth Supplemental Report in *Consolidated Southwestern Cases*, *supra*.

The conclusion we desire the Court to draw from all this is that, the Commission having declared in its aforesaid Nineteenth Supplemental Report that differences in operating costs and other transportation characteristics

warrant a higher level of rates in differential territory than in the remainder of the Southwest, it is beyond its constituted power to deny to appellants the right to publish and maintain higher rates on horses and mules in differential territory than the basic rates which prevail in the Southwest generally; that is to say, unless there be some special reason peculiar to the horse and mule industry whereby that traffic may be singled out and set apart for treatment different from that applying to the general run of commodities, and the Commission points to none, it amounts to an abuse of its administrative discretion for the Commission to require that uniform rates on horses and mules be maintained throughout two large rate groups between which there are recognized to exist substantial differences in operating costs and transportation characteristics.

Point XII.

The Commission being without jurisdiction under the scope of the issues raised in the consolidated proceedings to prescribe rates on horses and mules to apply uniformly throughout southwestern territory, its attempt to coerce appellant carriers, by the issuance of its Fourth Section Order No. 11340 of July 24, 1933, whereby previously granted fourth-section relief in connection with the prescribed rates on horses and mules then in effect in south-

western territory was withdrawn, constituted an illegal abuse and misuse of the powers conferred upon it under the provisions of § 4 for the purpose of compelling appellants, without the issuance by it of an order pursuant to § 1, to accept and give effect to the findings of unreasonableness made in purported compliance with § 1 (R. 1129).*

It has previously been noted that the issues before the Commission in the consolidated proceedings did not bring into review the rates on horses and mules prevailing generally throughout the Southwest, but instead only the rates to and from the primary markets, including *inter alia* the rates into and out of the Fort Worth market. Accordingly, because of these limitations upon its active jurisdiction in such consolidated cases the Commission was deprived of the power to issue an order giving effect universally throughout the Southwest to the findings and conclusions embodied in its 1933 report (R. 63-100). In evident realization that the scope of any order it might issue would be thus circumscribed, the Commission made the statement on page 449 (R. 95) of said report that no orders requiring the establishment of rates in conformity therewith would then be entered, "but defendants will be expected to establish such rates within 90 days after the service of this re-

*Germane particularly to the 2nd, 21st, and 39th assignments of error (R. 152, 159, 160). See also the 17th ground for relief in Amended Bill (R. 52-54).

port," and, that not being done, "we will consider the entry of appropriate orders."

The Commission recognized in 1924 and 1925 that the mileage rates then prescribed or authorized would be unworkable unless accompanied by a grant of adequate fourth-section relief, and its respective rate orders were accordingly accompanied by its Fourth Section Orders Nos. 9059 and 9183 (R. 111-15), thereby enabling the carriers to give effect to the rate orders without contravening the requirements of § 4 of the Act. Manifestly, for reasons which we shall directly explain more fully, the withdrawal at any time of the fourth-section relief so granted would at once have had the practical effect of nullifying the rate orders because of the inability of the carriers to maintain the prescribed or authorized rates in the absence of adequate fourth-section relief. This withdrawal of fourth-section relief was in fact sought to be accomplished by the Commission through the issuance of its Fourth Section Order No. 11340 (R. 1117-18) along with the issuance and service of its report on further hearing of July 24, 1933, in that such fourth section order contemplated that the prior grants of fourth-section relief would be vacated and set aside, effective February 5, 1934. Appellants have charged in their Amended Bill that the prospective withdrawal through Fourth Section Order No. 11340 of the fourth-section relief previously granted was di-

rectly attributable to a recognition on the part of the Commission of its inability under § 1 of the Act to compel the carriers to publish generally throughout the Southwest the prescribed lower rates, and that in consequence it sought to coerce them into doing so by such misuse and abuse of the powers conferred upon it under § 4 thereof.*

Since the revised rates which the Commission so sought to impose upon appellants are substantially less than those prescribed or authorized by it in 1924 and 1925 and in respect of which its Fourth Section Orders 9059 and 9183 were entered, there could be no possible necessity for the denial of the fourth-section relief previously granted on the theory that the then current rates were not sufficiently remunerative to meet the requirements of the fourth section. We therefore maintain that in entering such Fourth Section Order No. 11340 the Commission sought to accomplish by the abuse and misuse of the powers conferred upon it under § 4 that which it was able to accomplish only partially by means of a rate order issued under the authority of § 1.

*The fact that the effective date of Fourth Section Order No 11340 was thereafter postponed (R. 1041-42) until March 8, 1934, by order dated January 6, 1934, is without legal significance. At the time this postponement was effected appellants had declined to yield to such coercive efforts on the part of the Commission, but on the contrary had presented to that tribunal (R. 1045-80) their petition for reconsideration and rehearing dated November 6, 1933, and so had put the Commission to the necessity of entering its assailed rate order of December 11, 1933, to enable it to give legal effect to the findings and conclusions embodied in its report on further hearing of July 24, 1933. In short, the attempted fourth section denial had failed of its purpose, and there was then nothing to be gained by not postponing the effective date thereof.

Point XIII

The refusal of the Commission to reopen the consolidated proceedings for reconsideration and to grant appellants a further hearing pursuant to their petition dated November 6, 1933, wherein, among other things, attention was directed to the fact (a) that since the close of the last hearings held therein on May 27, 1932, both the demand for and value of horses and mules had appreciated to a substantial degree, this not representing a mere seasonal fluctuation in demand and value, and (b) the financial integrity of the appellant carriers had been so weakened that they were in no position to stand the drain upon their revenues which would result from the reductions of their rates on horses and mules called for by the findings in the Commission's report of July 24, 1933, was arbitrary and unreasonable (R. 1129).*

The Enhanced Demand for and Value of Horses and Mules

Appellants desire that it be clearly understood at the outset that in advancing this proposition they are not relying upon a mere seasonal fluctuation in the demand for and value of horses and mules, but that on the con-

*Germane particularly to the 18th, 19th, 45th, 46th, and 54th assignments of error (R. 158, 161). See also the 7th and 16th grounds for relief in the Amended Bill (R. 36-38, 50-52).

trary they propose to convince the Court that between the close of the last hearing held by the Commission in the consolidated proceedings in May, 1932, and the rendition of its report on further hearing of July 24, 1933, a phenomenal change took place in the price trend of such animals which in reality was equivalent to a counterpart, although of course more circumscribed in its scope, of the wide-spread change in conditions that began in 1929, said by this Court, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, l. c. 260, to be "the outstanding contemporary fact, dominating thought and action throughout the country."

Stated otherwise, appellants maintain that there has occurred a definite and unmistakable reversal of the downward price trend of horses and mules of the past few years which, in its more limited sphere, has a no less pronounced economic significance than did the 1929 economic collapse which was responsible for the vacation by this Court of the orders entered by the Commission in the so-called *Western Grain case* because of its failure to heed the plea of the carriers for a rehearing predicated upon the radically changed conditions that had taken place subsequent to the close of the hearings in that proceeding.

Nor is this case subject to the limitation upon what was there said by the later expression embodied in *United States* v. *Northern P. Ry. Co.*, 288 U. S. 490, as to the

carriers' lack of diligence, inasmuch as the change of conditions here relied upon did not set in until about the beginning of the year 1933, and scarcely achieved sufficient notoriety to attract public attention until after the Commission's report on further hearing was rendered on July 24, 1933. And even at the time their petition for reconsideration and further hearing was filed in November, 1933, counsel for appellants had at hand only an insignifcant portion of the rather comprehensive data which were later assembled and presented to the court below. Indeed, a casual inspection of Exhibit AQ (R. 1116A) will disclose that even between September and October, 1933, and the date of the trial, for the period antedating which the latest authentic price quotations would have been available when the petition in question was prepared, a substantial additional increase occurred in the values of horses and mules.

However, based upon the information available to counsel at the time, including the admission by witness M. Fies (Exhibit AL, R. 1111-12, 1113-14) on cross-examination at the hearing held in September, 1933, in No. 25627, *Fies & Sons* v. *Alabama G. S. R. R. Co.*, 201 I. C. C. 523, that an upward price trend of horses and mules had then developed, there were embodied in the 1st, 16th, and 17th assignments in said petition (R. 1047, 1054) allegations to the effect that during the approximately eighteen months after the last hearing

was held the demand for and the value of horses and mules, as in part disclosed by data then available in the files of the Commission, had appreciated to a substantial degree, so that the findings in the Commission's report were not in accord with the conditions then existing; also, that since the last hearing was concluded there had developed a strong trend towards the increased use of horses and mules on the farms, contrary to the finding on page 424 (R. 70) of said report that the use of horse and mule power on the farms had decreased rapidly and steadily with the growth in the use of trucks and tractors.

It will be noted that no reference appears in the foregoing assignments to the publications of the Census Bureau and of the United States Department of Agriculture tendered in evidence herein by appellants as Exhibit AH (R. 1094-98), Exhibit AI (R. 1098-1103), Exhibit AJ (R. 1103), and Exhibit AK (R. 176), this for the reason that counsel had not then come into possession thereof. But thereafter, before the Commission's order denying said petition was served (R. 1044) on December 27, 1933, and before appellants had any intimation that their petition would be acted upon in so short a time, counsel in good faith prepared and filed with the Commission a motion to delete (R. 1083-86) dated December 22, 1933, and filed December 26, 1933, wherein the Commission's attention was directed (R. 1085) to the

Census Bureau's bulletin "The Farm Horse" (Exhibit AH, R. 1094-98) and to "The Agricultural Outlook for 1934" (Exhibit AI, R. 1098-1103) issued by the Department of Agriculture in November, 1933.

Aside from that, though, we submit that the allegations set out in the petition itself were sufficient to put the Commission on ample notice that the horse and mule industry had reached "a turn in the lane" since the close of the prior hearings, and that the carriers were entitled to an opportunity to present proof of the fact and extent of such change in conditions. Under these circumstances, we submit that the right of the Court to receive and consider this evidence of a radical upturn in economic conditions since the record before the Commission was last closed in 1932 is ruled by the decision of the Supreme Court in the *Western Grain case*, 284 U. S. 248, *supra*, rather than by what was said in its later opinion in *United States* v. *Northern P. Ry. Co.*, *supra*.

We shall accordingly now proceed to a discussion of the evidence* in question as to changes in economic conditions. Let us first take the statement of average prices received by farmers for livestock by months, as reproduced from reports of the United States Department of Agriculture, since the record before the Commis-

*The acceptance of the documentary exhibits tendered in the trial court by appellants (petitioners therein) in support of their allegations as to changed conditions, as well as various other items of their documentary evidence, was objected to by counsel for appellees (R. 174, 176-83). No order rejecting any of these exhibits was entered in the trial court, and they were hence incorporated in the record on appeal.

sion was closed in May, 1932, Exhibit AQ (R. 1116A). From this it will be noted that since January 1, 1933, there has been a steady and almost continuously progressive increase in the price per head of horses and mules. These quotations disclose that, even in February, 1934, taking as 100 per cent the value on January 15, 1932, the January (1934) Index Number of horses, 130.36, became 142.86, while during the same period the Index Number of mules increased from 138.10 to 149.20. Stated otherwise, on February 15, 1934, the average farm price of horses exceeded by 42.86 per cent the average farm price of $56.00 on December 15, 1932, whereas the $61.00 farm price of mules on December 15, 1932, had increased to $94.00 by February 15, 1934, or 54.10 per cent.*

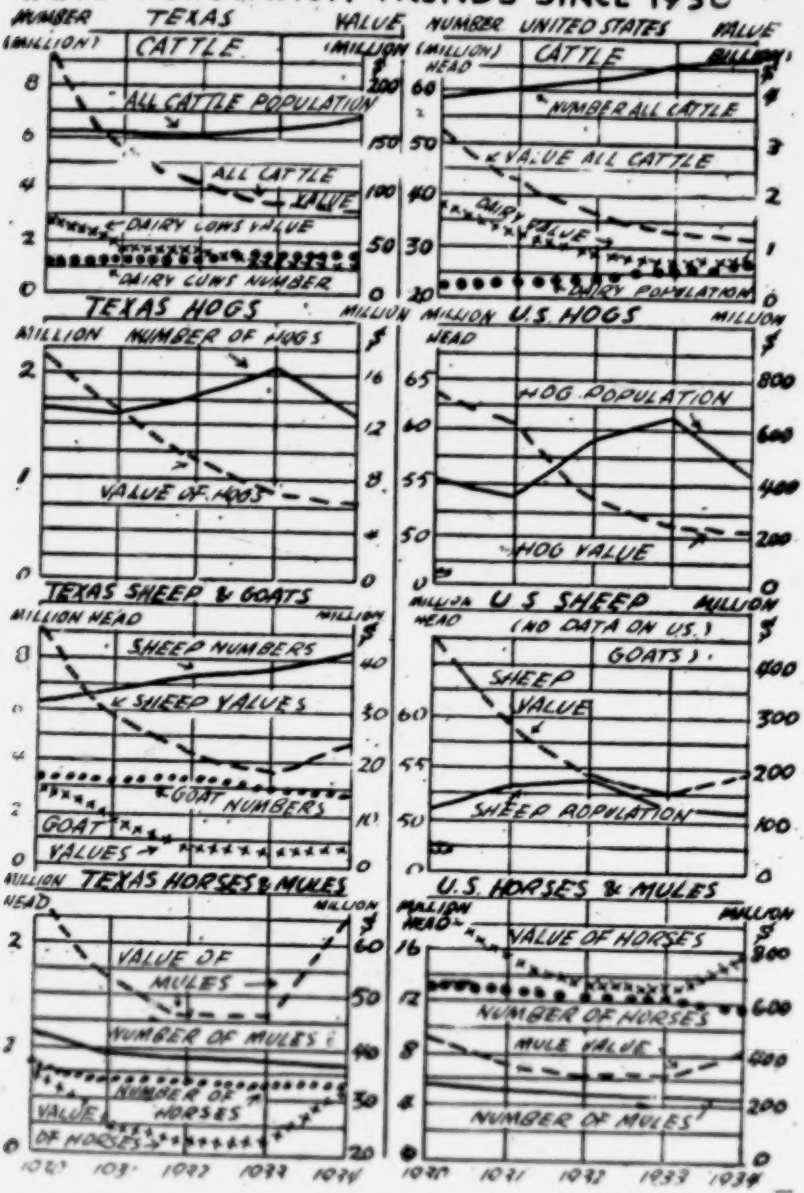
Let us contrast these figures with the showing on the same exhibit as to the price per pound of edible livestock, as well as the price per head of milch cows. Although beef cattle, for example, showed a slight increase in February of last year over January, all through the year 1933 the price thereof remained substantially below the price level after May 15, 1932. And even in February, 1934, the Index Number was only 85.54.

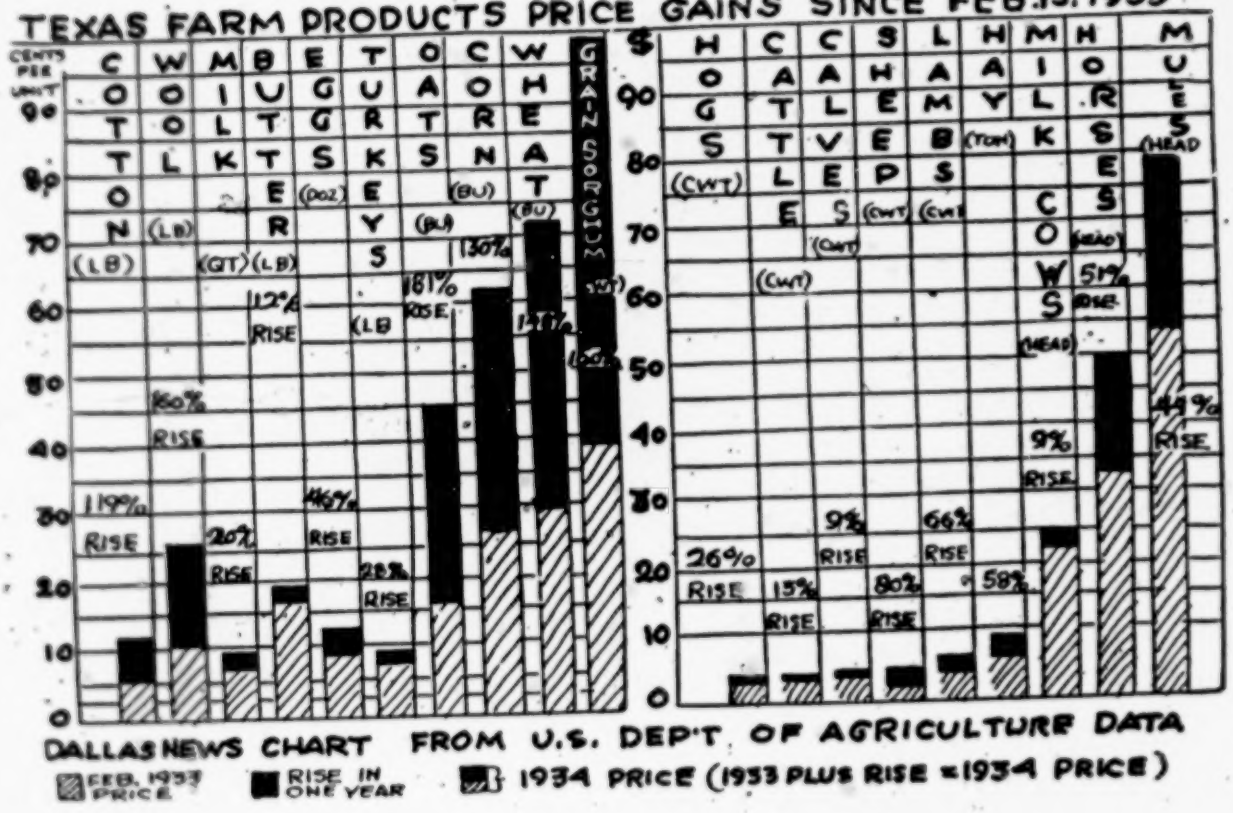
*These latter percentages do not correspond to that recited in Exhibit AQ, which are based upon the average prices on January 15, 1932. We do not use the 1932 prices as the base for comparative purposes, however, in view of the fact that at the hearing only that portion of the exhibit was offered (R. 181-82) which related to changes in conditions since the record before the Commission was closed in May, 1932. The average monthly farm prices of horses and mules prior to 1932, and on March 15th of that year, appear on page 3 of Exhibit C-298, a part of Exhibit KK before this Court.

Somewhat similar conditions have prevailed as to other edible livestock except that an increase is reflected in the price of sheep and lambs. The hog prices have fluctuated more or less eratically but with no definite trend. (These comparative figures lend support to our contention under Point IV that horses and mules are not subject to the same competitive conditions as those which bear upon edible livestock.)

Through the courtesy of The Dallas Morning News, Dallas, Texas, facing this page we are reproducing a graph that appeared in that publication during the early part of 1934 which strikingly illustrates the sharp upward turn that took place in 1933 in the value of horses and mules, and to a less degree of sheep, contrary to the price trends of cattle and hogs. This graph sets out the price trends in Texas separately from those of the United States as a whole, the Texas showing being predicated upon the data embodied in Exhibit AK (R. 176). More recently, the same journal has printed another graph, likewise reproduced in this connection for purposes of illustration, in which what may well be termed the unprecedented upturn that has taken place in the prices of horses and mules is brought into sharp relief. While this latter graph is based upon Texas prices, the showing therein made conforms closely to the price figures embodied in Exhibit AQ (R. 1116A) and Exhibit AJ (R. 1103).

TEXAS AND U.S. LIVE STOCK VALUE AND POPULATION TRENDS SINCE 1930




TEXAS FARM PRODUCTS PRICE GAINS SINCE FEB. 15, 1933
CENTS PER UNIT
COTTON (LB)
WOOL (LB)
MILK (GT)
BUTTER (LB)
EGGS (DOZ)
POTATOES (LB)
ONIONS (LB)
CABBAGE (LB)
WHEAT (BU)
CORN (BU)
GRAIN SORGHUMS (CWT)
$
HOGS (CWT)
CATTLE (CWT)
CALVES (CWT)
SHEEP (CWT)
LAMBS (CWT)
HAY (TON)
MILCH COWS (HEAD)
HORSES (HEAD)
MULES (HEAD)
119% RISE
160% RISE
20% RISE
112% RISE
46% RISE
28% RISE
181% RISE
130%
17%
10%
26% RISE
15% RISE
9% RISE
80% RISE
66% RISE
58%
9% RISE
51% RISE
49% RISE
DALLAS NEWS CHART FROM U.S. DEP'T OF AGRICULTURE DATA
FEB. 1933 PRICE
RISE IN ONE YEAR
1934 PRICE (1933 PLUS RISE = 1934 PRICE)

The underlying conditions responsible for this radical reversal of price trends in the case of horses and mules are attributable to a recently developed greater demand therefor in connection with a scarcity of production, as is explained and commented upon at pages 81-82 of Exhibit AH (R. 1094-98), "The Farm Horse," issued by the Bureau of the Census and reviewing the farm horse situation as it appeared in February, 1933 (R. 1094), and on pages 55-56 of Exhibit AI (R. 1098-1100), "The Agricultural Outlook for 1934" of the U. S. Department of Agriculture. In its 1933 report in these cases, as mentioned above, the Commission comments at page 424 (R. 70) upon the use of horse and mule power on farms having decreased "as there has been a growth of the use of trucks and tractors." According to the foregoing publications, however, the farmers are now reverting in a large measure to the use of horse and mule power on the farms, which in itself is an economic development of no small significance.

In the 17th assignment in the aforesaid petition for reconsideration and further hearing (R. 1054), the attention of the Commission was directed to the existence in its own files of evidence given in other cases (Nos. 25767 and 25627, 200 I. C. C. 766 and 201 I. C. C. 523) along the lines indicated above. To avoid encumbering the record unduly, and to avoid additional expense, appellants have submitted in evidence only the relevant

testimony given in No. 25627 (Exhibit AL, R. 1110-12, 1113-14), the hearing in which was more recent than that in No. 25767. It will be noted that the witness for complainants in No. 25627, M. Fies, was constrained to admit on cross-examination that in September, 1933, a serious shortage had developed in the production of horses and mules and that a price increase of about 10 per cent, or specifically from $75.00 to $85.00, had occurred since September, 1932.

Although the Commission avoided any mention in its reports in Nos. 25767 and 25627 of the upward price trend of horses and mules disclosed by the evidence therein, it has in subsequently decided cases involving the rates on horses and mules in central territory commented upon that feature. Thus, in *Grand Island Livestock Commission Co.* v. *Railway Co.*, 205 I. C. C. 267, 271, reference is made to the evidence of defendants "that the prices of horses and mules, like those of most other commodities, have materially increased during the last year or so." It then adds that they urge that the traffic can well bear the rates assailed, which we have previously seen are higher, both relatively and absolutely, than are the southwestern horse and mule rates prescribed in 1933. The complaint was dismissed. In likewise dismissing the complaint in *Crandall Horse Co.*

v. *Railroad Co.*, 206 I. C. C. 209, the Commission commented thus (page 210) on the price situation:

> "For many years prior to 1933 the trend of the horse-and-mule business was downward, due to the extensive use of trucks and tractors. With increased demand for horses for drayage and on farms, the average price of horses at Chicago advanced from $90 per head in 1932 to $103 in 1933 and $123.58 for the first 10 weeks of 1934. The average prices per head of draft, delivery-wagon, and farm horses, in top pairs, during the week ending March 22, 1934, are shown as $240, $200, and $150 respectively."

The foregoing price data bring us approximately up to the date this cause was submitted in the court below, and of course there is available of record no information as to subsequent developments. However, on the assumption that the Court will feel privileged to take judicial notice of official government publications, and especially so of those from which the price data of record were largely drawn, we are taking the liberty of quoting below from page 69 of "The Agricultural Outlook for 1935" of the U. S. Department of Agriculture, Miscellaneous Publication No. 215, November, 1934:

> " * * * On September 15, 1934 the average farm price of horses was $79 per head compared with $69 on the same date a year earlier, and the prices of mules stood at $94 per head in September 1934 as against $77 in September 1933."

From "Crops and Markets," Vol. 12, No. 2, for February, 1935, published monthly by the U. S. Department of Agriculture, we abstract from page 1 the following:

> "*Horses.*— * * * The value per head of all horses and colts on January 1, 1935, was $76.18 compared with $66.30 a year earlier. The total value this year was $901,038,000 compared with $793,155,000 a year earlier.
>
> "*Mules.*— * * * The value per head of mules and mule colts on January 1, 1935, was $98.21 compared with $81.54 a year earlier. *This was the highest value per head since January, 1, 1921.* The total value of all mules on January 1, 1935, was $470,900,000 compared with $401,596,000 a year ago." (Emphasis ours.)

In the light of the foregoing, appellants most earnestly urge upon the Court that, with the information available to the Commission in its own files and by them brought to its notice, and in consequence of the other representations made to it in their aforesaid petition for reconsideration and rehearing, instead of a posthaste denial of such petition the Commission should have reopened the proceedings for further hearing and afforded appellants an opportunity to present evidence of the phenomenal change of horse and mule prices and of the underlying conditions responsible therefor. Because of its failure to do so, we respectfully submit that the Court should decline to permit the assailed orders of

the Commission to become effective and should enter its decree that same be set aside and held for naught.

The Weakened Financial Integrity of the Carriers

On pages 5-6, 8-9, and 23-26 (R. 1048, 1049-50, 1058-60) of their petition for reconsideration and further hearing dated November 6, 1933, appellants further directed the attention of the Commission to the fact that, although its report on further hearing was not rendered until more than a month after the 1933 amendment of paragraph (2) of § 15a of the Interstate Commerce Act (§ 205 of the Emergency Railroad Transportation Act, 1933) was approved, the admonitions embodied in the latter were not reflected in the findings and conclusions expressed in its said report. Thus, we look in vain for any finding therein that the condemned rates on horses and mules in the least retarded the movement of the traffic; nor would a finding that the traffic does not move freely, as pointed out in a prior section of this brief, be in accord with facts established of record.

We next come to the second principle of rate-making enjoined upon the Commission by the 1933 amendment. In *General Rate Level Investigation, 1933*, 195 I. C. C. 5, decided July 31, 1933, precisely a week after the date of its 1933 report in these proceedings, the Commission

at pages 61 and 71 commented upon and analyzed the meaning and effect of this amendment. We quote in part as follows from page 71:

> "* * * In the 1933 Act the Congress points to the need, in the public interest, of adequate and efficient railway transportation service. But such service can not be maintained if the cream of the railroads' traffic is to be taken by competitors *and if we require reductions on the traffic not subject to competition.*" (Emphasis ours.)

On pages 7-9 (R. 1049-50) of their petition of November 6, 1933, appellants pointed out to the Commission that an extremely large proportion of the commodities transported by them, notably, petroleum oil, edible livestock, and grain, move at inordinately low rates by reason of the stress of competitive and economic conditions, and that it is now proposing to impose upon them a reduction of their rates on horses and mules along with similar rate reductions that have been inflicted upon them in respect of other freely-moving traffic not subject to competitive and economic influences, among which were mentioned cement, bananas, and coal. *Cf. Oklahoma Portland Cement Co.* v. *Railway Co.*, 128 I. C. C. 63, cement; *Southern Produce Co.* v. *Railway Co.*, 165 I. C. C. 423, bananas; *Amherst Elevator Co.* v. *Railway Co.*, 191 I. C. C. 569, coal. In the various southwestern banana and coal cases reparation awards aggre-

gating perhaps $1,000,000.00 or more (we volunteer this statement as counsel) have been made or are in prospect.

It is in this manner that the Commission, by a process of attrition, as it were, has been "whittling away" the revenues of the southwestern carriers, thus accomplishing by degrees what this Court struck down when done on a larger scale in the *Western Grain case* cited above. We shall directly comment upon the tangible financial effect of the rate reductions to which the southwestern carriers have been and are being constantly subjected, either by reason of competitive and economic influences or by act of the Commission and other regulatory bodies. *In either event the end ultimately achieved is the same.*

Lest we be misunderstood, we hasten to say that appellants have no thought that the rates on the horse and mule traffic can or should be pitched upon a sufficiently high plane to offset the losses they have sustained on other traffic, but they do maintain that under the horse and mule rates assessed by them, even those prescribed or authorized in 1924 and 1925, the traffic is or was bearing its proper share of the transportation burden. We believe that on this point the following excerpts from

the opinion of this Court in *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, l. c. 421, are apropós:

> "There are involved only the rates applicable to a part of the company's business. * * * The applicable law is plain. The State is without power to require the traffic covered by the fare enjoined to be carried at a loss, or without substantial compensation over its proper cost. * * * While the carrier has no constitutional right to the same rate or percentage of return on all its business, the State may not select any class of traffic for arbitrary control and regulation."

As to the third element of rate-making enjoined upon the Commission by the Congress, nowhere in its report on further hearing do we locate any suggestion that the southwestern carriers are not being operated honestly, economically, and efficiently. To the contrary, the Commission indirectly found otherwise on page 55 of its report in *General Rate Level Investigation, 1933, supra.*

Thus, it will be seen that by none of the tests laid down in paragraph (2) of § 15a, as revised June 16, 1933, can the Commission find any warrant for imposing upon appellants the reduced rates on horses and mules prescribed in its assailed 1933 order to apply in the Southwest. This leads us to a review of the evidence dealing with the financial condition of appellant carriers.

By evidence of record before the Commission (Exhibit C-296) it was shown that at no time during the

11 years prior to 1932 were the carriers permitted to earn the authorized return of 5.75 per cent upon their property investment. For the United States as a whole the highest return was in 1926, when it amounted to 4.96 per cent, but for the western district (sheet 3 of Exhibit C-296) the highest return, 4.44 per cent, occurred in 1929. These data are commented upon by the Commission on page 442 (R. 88) of its 1933 report, following which it is stated that the primary values compiled by the Commission pursuant to § 19a "constitute a higher grade of evidence than estimates such as those outlined." But in view of the condemnation by this Court of the manner in which the Commission's valuations were made (see the so-called *O'Fallon case*, 279 U. S. 461) the criticism so made does not appear to be well taken. So the courts would be advised of later developments, appellants filed in the trial court as their Exhibits AM, AN, and AP (R. 1114A, 1114B, 1114C, 1114D, 1115) various statistical statements wherein their earnings during the years 1932 and 1933 are tabulated.

Statement No. M-100 (R. 1114A) for June, 1933, was tendered to represent in a general way the situation that existed at about the date the Commission rendered its 1933 report herein, as well as the picture in the minds of its members when *General Rate Level Investigation, 1933, supra*, was decided on July 31, 1933. In the lower

right-hand corner of this statement appears a graph which points to a sharp upward turn in the aggregate net railway operating income of the Class I steam railways in the United States during the first six months of the year, contrary to the trend that prevailed during the first half of each of the two preceding years.

Statement No. M-100 (R. 1114B) for December, 1933, should be considered along with Exhibit AP (R. 1115), the latter containing a partial revision of the statistics in the former, as will now be explained. The Santa Fé and Rock Island systems have extensive mileage both in the southwestern region and in what is known as the central western region, but the Commission's Bureau of Statistics includes in the central western region for accounting purposes the earnings of the Atchison, Topeka and Santa Fé, the Panhandle and Santa Fé, the Chicago, Rock Island and Pacific, and the Chicago, Rock Island and Gulf, as well as of the Fort Worth & Denver City, the latter a subsidiary of the Burlington system. Accordingly, in Exhibit AP the earnings set out in Statement No. M-100 for December, 1933, have been so readjusted as to transfer from the central western region to the southwestern region the earnings of the five carriers named above. Exhibit AP, however, additionally recites the percentage that the net railway operating income of the respective regions in 1933 bears to the corresponding figures for 1932.

The point we seek to illustrate by these exhibits is that, with the exception of the New England region and the southwestern region, the net railway operating income of the carriers in all the eight regions named in these exhibits reflect a substantial increase in 1933 over 1932. But in the southwestern region, taking the figures as allocated by the Commission, the net railway operating income in 1933 amounted to $22,966,621, or 99.60 per cent of the corresponding figure for 1932. After making the readjustment referred to above, though, the net railway operating income of the carriers in the southwestern region (which in general are those subject to the orders of the Commission assailed herein) is only 92.07 per cent of that for the preceding year, the precise figures being $45,156,971 in 1932 and $41,578,385 in 1933.

That this falling-off in earnings is attributable to rate reductions rather than to a decreased volume of movement is readily apparent from the following figures that we have abstracted from Statement No. M-220 (R. 1114C):

SOUTHWESTERN REGION

Year	Revenue Tons (Thousands)	Revenue Tons Carried 1 Mile (Thousands)
1932	88,247	19,177,004
1933	90,139	20,325,451

The above showing demonstrates what appellants maintain is the consequence of the "whittling" process

commented upon above. In all fairness, however, it should be said that we do not charge the Commission with responsibility for all the rate reductions that have been made, as in quite a large measure they have been brought about by the competitive influence of trucks, pipe lines, interior waterway barge lines and intercoastal shipping, and the like, but the situation is such that in the view of appellants the Commission should refrain wherever possible from aggravating the difficulties which they unavoidably encounter otherwise.

Before concluding, we desire to point out that the net railway operating income set out in Statement No. M-100 does not represent the net income of the carriers available for their surplus or dividend accounts, as substantial deductions are made from their gross income (net railway operating income plus other income) in order to arrive at their net income. We have therefore additionally filed of record as Exhibit AN (R. 1114D) a copy of Statement No. M-125 for December, 1933. By reference to page 2 of this exhibit (not reproduced in the printed record) it will be noted that in the southwestern region the 1932 deficit of $30,976,333 increased to $32,000,270 in 1933, as contrasted with a decrease of the recited deficit for the United States as a whole from $150,633,819 in 1932 to $13,800,930 in 1933. These figures, we believe, call for no further comment on our part.

Corresponding data for the period subsequent to 1933 are available from the Commission's Annual Report for 1934, pages 3-4, and from its decision of March 26, 1935, in *Emergency Freight Charges, 1935*, 208 I. C. C. 4, at pages 17-21.

Point XIV.

The entire course of the Commission, from the time it reopened in the absence of complaint the South Dakota and Nebraska cases for consolidation with the southwestern cases until its peremptory denial of appellants' petition for reconsideration and further hearing of November 6, 1933, manifests a set purpose and a fixed design on its part to project into southwestern territory the 115 per cent relation of the horse and mule rates to the fat cattle rates which had hitherto been prescribed in the South Dakota and Nebraska cases, although previously declared to be improper in southwestern territory (R. 1129-30.)*

It has been shown that on January 4, 1926, in the absence of any petition from any of the parties identifed therewith, the Commission on its own motion severally reopened for further hearing all of the complaints later disposed of as a consolidated proceeding by its report on further hearing of July 24, 1933, entitled *Western*

* Germane particularly to the 20th assignment of error (R. 158).

Horse and Mule Rates, 195 I. C. C. 417. Appellants maintain that the sole reason by which the Commission was actuated in so doing was to afford a predicate for transplanting into the Southwest the 115 per cent relation that had been adopted in the *South Dakota* and *Nebraska cases*, which were originally heard and decided independently of the southwestern cases, and that from that time on its actions and course in the handling of the consolidated proceedings evinced a preconceived and premeditated determination to establish that rate relation in the Southwest. We believe the foregoing thesis can be sustained by a review of the successive steps followed by the Commission from the date its orders reopening the respective complaints were entered on January 4, 1926, until the petition of the southwestern carriers for reconsideration and rehearing of November 6, 1933, was denied.

We have seen that in 1924 and 1925 the Commission rejected the contention of the southwestern shipping interests that the rates on horses and mules in the Southwest should not exceed 115 per cent of the southwestern beef cattle rates, although noting at the time (93 I. C. C. 487) that that relation had been fixed in the *South Dakota* and *Nebraska cases*, and instead adopted a scale of rates which it had previously prescribed to apply in that general section on bags, potatoes, and soap. The rates so prescribed or authorized were made effective

in 1925, except that on petition of the Kansas and Kansas City interests the Commission postponed the effective date of that part of its 1924 order which prescribed rates in the southern part of western trunkline territory, principally Kansas and Missouri, that having been done upon representations that a lower rate level on horses and mules prevailed in that territory.

On February 6, 1928, the Commission entered a further order in the consolidated proceedings (R. 962) whereby it modified its reopening orders (R. 939-40, 960-61) of March 16, 1925, and January 4, 1926, "so as to provide for the reopening of these proceedings for further hearing with respect to the reasonableness, lawfulness, and propriety of the rates and minimum weights for the future only." The only inference we are able to draw from this modification of the prior orders is that the Commission thereby sought to avoid the necessity for making the detailed and explicit findings which are required by paragraph (1) of § 14 of the Interstate Commerce Act.

During the course of the 1928 hearing thereafter held before Examiners Simons, Carney and Mackey, the former insinuated a series of questions at the end of the direct testimony of witness B. D. Pelton (R. 614) relative to the propriety of relating the rates on horses and mules in the Southwest to those on beef cattle, assum-

ing as a predicate that the Commission would later prescribe a number of scales of rates in that territory on edible livestock in No. 17000, Part 9, as was in fact done.

And further on in the course of that hearing (R. 654) Examiner Carney propounded a similar question to witness J. H. Tedrow at the close of his testimony, except that the even more pointed question was asked whether the rates on horses and mules should be 15 per cent over the cattle rates.

Then came the proposed report of Examiner Simons in 1929, in which, as had been adumbrated, he recommended that the southwestern horse and mule rates be made 115 per cent of the corresponding rates on beef cattle.

It is such straws as these that point to the way the wind blows.

Lastly, after it had again reopened the consolidated cases for further hearing by its order of February 1, 1932, the Commission issued a notice (R. 772) dated February 11, 1932, as reproduced on page 19 of the Amended Bill (R. 25) in which the parties were invited to present at the ensuing hearing as nearly as possible the same evidence as that offered by them in the reopened western district livestock case.

Attention is here directed to the declaration of counsel for appellants at the opening of the 1932 hearing

(R. 772) that "we have previously insisted and still maintain that there are material differences between the traffic and transportation conditions incident to horse and mule traffic and those incident to edible livestock traffic and in some respects our evidence here will differ from that that we propose to introduce in the livestock case later on—that is, the edible livestock case." The carriers accordingly elected to present in the horse and mule cases the evidence which in their opinion was relevant thereto, irrespective of whether same had any application to or bearing upon the issues in the edible livestock case or not.

Intervening between the two reopened hearings held in 1928 and 1932 the present severe economic depression had its inception in the Fall of 1929, and the 1932 hearing, according to the lights now before us, appears to have been held almost at the low point of the depression.

Then followed on January 10, 1933, the rendition of the Commission's report on further hearing in *Livestock—Western District Rates*, 190 I. C. C. 611, wherein to all practical purposes it reaffirmed its original decision in that proceeding of June 8, 1931, 176 I. C. C. 1.

Also, contrasted sharply with the deliberate manner in which the Commission proceeded to hold hearings in 1928 and 1932 following the reopening of the consolidated

proceedings in January, 1926, and in delaying its report on further hearing until July 24, 1933, is its abrupt denial (R. 101-2) on December 11, 1933, of appellants' petition for reconsideration and rehearing filed (R. 1043, 1045) November 8, 1933, even before appellants were able to prepare and file their petition to delete certain statements in the answer to their petition filed by the Kansas City Chamber of Commerce (R. 1083-86).

Lastly, so intent was the Commission upon preserving the artificial and unnatural *liaison* which it had, as above outlined, designedly contrived to establish between the wholly unrelated rates on horses and mules in the South Dakota and Nebraska section and those in the Southwest, that in postponing upon telegraphic notice by the district judge (R. 1093) of the institution of this cause the effective date of its assailed orders, such postponement was applied to the assailed orders as an entirety (R. 1086-88) by order dated February 5, 1934, even though no suit or other complaint had been brought against that portion thereof relating to the South Dakota and Nebraska rates. And this action was taken with full notice (Exhibit AF—R. 1093) that no injunctive relief was sought in so far as the *South Dakota* and *Nebraska cases* were concerned. The Commission was at entire liberty, had it been so pleased, to allow its order to become effective on March 8, 1934, as originally directed, so far as it had to do with the South Dakota

and Nebraska rate adjustment, but to have done that would, of course, have overturned the artificial edifice so assiduously devised by it.

It is accordingly on the strength of the factual situation hereinabove portrayed that we make the assertion that, while the Commission's report on further hearing herein is nominally dated July 24, 1933, the true date of the decision therein announced was January 4, 1926.

Therefore, with its mind fatally bent on carrying into fruition the aim thus foreordained, the Commission, by a majority decision, has contrived so to limit and shape its findings that it has by—

Imparting substance to an empty shade

Imposed a gay delirium for a truth.

Point XV.

The assailed order of said Commission is void and useless in that it fails to meet the requirements of the governing statute:

1) **Not being a law unto itself, the Commission in prescribing rates must conform its orders to statutory requirements.**

2) **In prescribing rates under § 1 the Commission can not deny carriers their rights under § 15 nor subject them to penalties for violating § 4.**

3) **The Commission can not impose upon the carriers the burden of seeking relief from § 4 as to rates prescribed by it.**

4) **The grant of temporary relief from § 4 has not made this question moot, as carriers are yet subject to burden of obtaining a final order.**

5) **Question not rendered moot by mere entry of temporary order without allegation, proof, or finding that rates necessary to meet requirements of § 4 are just and reasonable, or are even reasonably compensatory for longer distances (R. 1130).***

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*Germane particularly to 22nd and 23rd assignments of error (R. 159). See also the 17th ground for relief in Amended Bill (R. 54-58).

The order of the Commission assailed in this proceeding prescribes under § of the Act what it declares to be maximum reasonable rates, and requires that the carriers, defendants before the Commission and appellants before this Court, establish, maintain, and apply no more than such rates for the interstate transportation of horses and mules (and in some cases burros and asses) in carloads, "according as they participate in the transportation,"—that is, by all routes which the Commission may require under paragraph (4) of § 15 of the Act. The rates so prescribed are on the basis of a distance scale, and are determined by the shortest distance by which carload freight can be transported without transfer of lading from one car to another (176 I. C. C. 83), no account being taken of the provisions of paragraph (4) § 15 of the Act. Under such basis numerous violations of the provisions of § 4 of the Act—the long-and-short-haul provision—are necessarily created, and in this case have in fact been created. While the Commission has power to grant relief from the provisions of said section and did grant the requisite relief along with its prior rate orders, it did not do so in the order under attack, but required petitioners to file an application therefor and on said application has granted only temporary relief. Under these facts it is submitted:

(1) The Commission, when it undertakes to prescribe rates, is bound to comply with the terms of the

Act, and is without power to compel the carriers to publish, maintain and observe rates which do not conform to all statutory provisions.

(2) In prescribing rates pursuant to § 1 of the Act the Commission can not lawfully deprive the carriers of their rights under paragraph (4) of § 15 nor require them to violate § 4 and thereby subject themselves to penalties.

(3) Nor can the Commission lawfully require the carriers to assume and bear the burdens of a fourth-section application and hearing with respect to rates prescribed by the Commission rather than initiated by the carriers.

(4) Temporary fourth-section relief granted by the Commission on application of the carriers has not rendered these questions moot, for the Commission has thereby left the carriers, which must yet obtain a final order, to bear a burden not their own, together with the expense entailed thereby, and so has deprived and is depriving them of their property without due process of law.

(5) The mere entry of the temporary fourth-section order, without allegation, proof, or finding that the lower rates permitted to competitive points, which are less than those prescribed under the Commission's formula and mileage scale to intermediate points on

so-called indirect routes, are reasonably compensatory does not render moot the question of the failure of the Commission to so construct its rates as to avoid violation of the fourth-section of the Act or to grant relief from the terms of said section upon the grounds and in the manner required by the Act. In its report the Commission made no finding, and none can be presumed, that the rates which it prescribed for particular rate-making distances will be just and reasonable, or even reasonably compensatory for longer distances.

The Commission, having taken over from the carriers the power to initiate and make rates with respect to the transportation of horses and mules in carloads in southwestern territory, rests under the duty of prescribing such rates as will not be in contravention of *any* section of the Interstate Commerce Act, and having prescribed here rates which are clearly in contravention of § 4 of the Act without making provision for relief from the terms of said section, as it is empowered to do under certain conditions, has exceeded its powers. Its order therefore, should be set aside and annulled.

At the time the Commission prescribed basic mileage rates on horses and mules in the Southwest in 1924 and authorized in 1925 the addition thereto of arbitraries for hauls in differential territory and eastern New Mexico, it recognized that adequate fourth-section relief was required in connection therewith to make the mile-

age rates so prescribed and authorized workable and accordingly entered concurrently therewith its Fourth Section Orders Nos. 9059 and 9183 (Exhibits D and E to Amended Bill—R. 111-15, original Exhibits PP and QQ), and in the proposed report prepared by Examiner Eshelman in 1925 he advised the Commission as follows:

> "Fourth section relief similar to that granted in *Horses and Mules in the Southwest, 1924, supra*, and in *Rates on Horses and Mules in the Southwest*, 102 I. C. C. 87, should be accorded." (Exhibit SS, R. 958.)

Likewise, at the hearing before another Examiner of the Commission in 1928 at Kansas City, Mo., the attention of the Commission was directed to the fact that if a mileage scale should be prescribed relief from the provisions of the fourth-section of the Act would be required (witness B. M. Gillespie, R. 715).

In the proposed report of Examiner Simons thereafter filed the necessity for fourth-section relief was distinctly pointed out, that part of the report dealing with fourth-section applications being as follows:

> "Upon further hearing herein, no evidence was offered by the carriers in support of their applications. * * * They ask that if this commission authorize the scales as proposed by them that they be given fourth section relief similar to that granted in the *Consolidated Southwestern Cases, supra*. * * * " (Exhibit VV, R. 1035.)

Still later, after the service of said proposed report, at the 1932 hearing at Kansas City the facts with respect to the necessity for relief from the fourth section were again presented to the Commission as follows:

> "In connection with the examiner's proposed report in Docket 12358, at sheet 77 the information was set out as to the fourth section in connection with the rates proposed. In this connection it is the view of the southwestern lines that if the commission should prescribe a mileage scale of rates on horses and mules, then the commission should at the same time authorize wide-open relief in order that the carriers could comply with the publication of the scales of rates.
>
> "Q. (By Mr. King) You mean relief as far as the fourth section of the act is concerned?
>
> "A. Yes, sir." (Witness R. E. Brandt. R. 871.)

But in its report of July 24, 1933, Exhibit A annexed to the Amended Bill (R. 63-100), the Commission, after stating that fourth-section relief "may be necessary," instead of granting said relief or so revising its scheme of rates as to comply with the fourth section, observed merely that the defendants may file applications for such relief as they may require in connection with the rates prescribed, and at the same time it denied the several applications for such relief which were then pending before it and ordered that outstanding fourth-section orders with respect to rates on horses and mules in the territory affected should be vacated six months

after service of the report. (195 I. C. C. 417, l. c. 449, R. 95.)

To recapitulate, by its assailed 1933 rate order appellants were directed, "according as they participate in the transportation," to publish and maintain the mileage scale of rates therein prescribed. This revised mileage scale was prescribed to supersede the mileage scales prescribed or authorized in 1924 and 1925, in connection with which the Commission simultaneously issued its Fourth Section Orders Nos. 9059 and 9183 (R. 111-15) in order to enable the carriers to make such mileage rates effective. The Commission had been informed and well knew that the revised mileage rates prescribed in 1933 could not be made effective in compliance with its rate order via the routes designated without an appropriate grant of fourth-section relief. It further was well aware that in many instances it would be absurd to attempt to apply the revised mileage scale prescribed by it over the short-line rate-making distances, and that in fact it was precluded by § 15 from requiring the carriers to short-haul themselves by applying the rates over such short-line distances, with the result that fourth section violations would inevitably occur at many points on routes via which the traffic would move and which by the Commission's order the carriers were required to establish.

Hence, for the carriers to hold the rates fixed by the scale at given points as maxima at intermediate

points not only would operate to deprive them of the just and reasonable rates at such intermediate points, to which they would be entitled under the Commission's order, but in addition the lower rates at these intermediate points would in turn affect the rates at yet other points intermediate to the latter, with the ultimate result that a vicious circle would be created which in the end would break down the Commission's prescribed scale. Additionally, by maintaining rates on the scale at some points and less than the scale at others undue preferences and prejudices prohibited by § 3 of the Act would ensue.

If any further evidence be necessary that the rates prescribed by the Commission, in which all of the appellants are required to participate, as the Commission says, "according as they participate in the transportation," it is supplied by the several maps of the railroads in the southwestern region which were offered in evidence and received, subject to objection, as Exhibits AR-1 to AR-9* (R. 182-83). It will be understood, of course, that these maps present merely typical illustrations of what the Commission has done and are representative of innumerable other violations of § 4 which have been created by the Commission's order.

The first map, Exhibit AR-1, illustrates one of the rates prescribed in Docket No. 13001, the *Kansas City*

* These map exhibits do not appear in the printed record, but copies thereof will be supplied for the Court.

case, the railroads making up the distance used by the Commission (761.9 miles) being colored green, and one of the direct routes required by the order, that of the Chicago, Rock Island & Pacific and Chicago, Rock Island and Gulf from Kansas City to Fort Worth, Texas, and Texas and New Orleans thence to San Antonio (943.4 miles) being shown in red. In making up its distance the Commission has used the St. Louis-San Francisco to Paola, Kansas, 42.9 miles, M.-K.-T. to Denison, Texas, 367.8 miles, T. & N. O, to Lancaster, Texas, 88.2 miles, M.-K.-T. of Texas to Italy, Texas, 31.4 miles, I. & G. N. to Waco, Texas, 47.7 miles, M.-K.-T. of Texas to Georgetown, Texas, 77.7 miles, I. & G. N. to San Marcos, Texas, 57.7 miles, M.-K.-T. of Texas to New Braunfels, Texas, 16.9 miles, and I. & G. N. to San Antonio, Texas, 31.6 miles.

We may remark in passing that this is, of course, not a route. Movement over it would be too slow and too expensive on account of the numerous transfers required, and the Commission could not under the provisions of paragraph (4) of § 15 establish such a route under any circumstances. However, we are not now arguing the Commission's right to make the rate on that basis from Kansas City to San Antonio, which is 61 cents per 100 pounds, although we regard it as highly questionable. Under the Commission's order the rate from Kansas City to the stations of Nolte and Schertz, Texas, which

are intermediate between Kansas City and San Antonio, on the line of the T. & N. O., using the Commission's scale and formula as prescribed, is 62 cents per 100 pounds, thus creating a fourth-section violation.

The second map shows violation of the fourth section between Fort Worth, Texas, and Shreveport, La., on the single-line route of Texas & New Orleans Railroad, the Commission's rate under its order to Shreveport being 33.5 cents per 100 pounds, and its rate to certain stations on the T. & N. O. (Preston, Keachie and Kolter, La.), which are intermediate, being 34.5 cents per 100 pounds.

The third map shows certain fourth-section violations created by the Commission's order in the *Wichita case*, Docket No. 11018, the rate-making distance from Wichita, Kansas, to Sweetwater, Texas, using four lines, being 431.7 miles, and a direct route required by the order of the Commission, Rock Island Lines from Wichita to Fort Worth, Texas, and Texas & Pacific thence to Sweetwater, 570.7 miles. The Commission's prescribed rate from Wichita to Sweetwater is 45 cents per 100 pounds, and its rate on the same basis to a number of intermediate stations on the T. & P., Mingus to Trent, is 46 cents per 100 pounds.

The fourth map shows origin violations of the fourth section on the route of the Union Pacific from Denver,

Colo., to Fort Worth, Texas, via Union Pacific to Junction City, Kansas, and the Missouri-Kansas-Texas Lines thence to Fort Worth, the rate prescribed, based on the distance from Denver to Fort Worth via Colorado & Southern to Pueblo, Denver & Rio Grande Western thence to Trinidad, Colo., Atchison, Topeka & Santa Fé to Des Moines, N. M., Colorado & Southern and Fort Worth & Denver City to North Fort Worth, Texas, and St. Louis-Southwestern thence to Fort Worth, Texas, 794.7 miles, being 62 cents per 100 pounds, and the rates also prescribed by the Commission from Bunell, Strasburg and Cedar Point, Colorado, to Fort Worth via the direct route first mentioned being in each case higher.

The fifth map is similar to the fourth, except that it covers the rate prescribed by the Commission from Fort Worth, Texas, to Denver, Colo., with higher rates via M.-K.-T. and Union Pacific from Fort Worth to Cedar Point, Strasburg and Bunell, Colo.

The sixth map shows the rate prescribed by the Commission from Fort Worth, Texas, to Heavener, Okla., using seven railroads to make a distance of 265.7 miles, the rate prescribed being 35.5 cents per 100 pounds, and also showing one of the direct routes prescribed by the order of the Commission via Texas & Pacific to Texarkana, Texas, thence Kansas City Southern to destination, 394.8 miles, with a rate of 37 cents per 100 pounds

to the stations of Hatfield and Mena, Arkansas, and Page, Okla., all intermediate on the line of the Kansas City Southern.

The seventh map discloses an illustration of the working of the Commission's prescribed rate from El Paso, Texas, to St. Louis, Mo., the rate, 88.5 cents, being based on a distance of 1,199.2 miles, made up of parts of seven railroads, and one of the direct routes required to be used by the order of the Commission, Texas & Pacific to Texarkana and Missouri Pacific to destination, carrying rates under the same order at intermediate points, McNary, Fabens and Ysleta, Texas, of from 89.5 to 91 cents per 100 pounds.

The eighth map illustrates the situation created by the Commission with respect to rates from El Paso, Texas, to Wichita, Kansas. There the Commission has fixed 61 cents per 100 pounds, based on the distance between said points via the four lines colored green. One of the direct routes is the single-line route of the Atchison, Topeka & Santa Fé shown in red. While the Commission under the issues in these proceedings did not have before it rates from points in New Mexico north of El Paso on the Atchison, Topeka & Santa Fé, nor, for that matter, from points in New Mexico on the Southern Pacific or the Rock Island, which form a part of the rate-making distance to Wichita, Kansas, that distance, nevertheless, controls, and the map shows

that if the Commission's formula is used from La Tuna, Texas, and Mesquite, Las Cruces and Olivio, N. M., there will be a violation of said fourth section. In fact, as the Commission was well aware, the rates from said points, La Tuna, Mesquite, Las Cruces and Olivio to Wichita, that were in effect prior to August 1, 1934, were those authorized by it some ten years ago by its decision in 102 I. C. C. 87.

Therefore, the Commission, had it conformed with the requirements of law, should either have refused to prescribe the 61-cent rate from El Paso to Wichita via the route of the Santa Fé, or have provided that line with fourth-section relief with respect to the higher rates in effect from the intermediate points, or have provided relief by using the same scale and formula from such intermediate Santa Fé points as were prescribed from El Paso. Should the Santa Fé be obliged to publish the 61-cent rate from El Paso to Wichita, Kansas, and not eventually receive appropriate authority to depart from the provisions of the fourth section, it will be necessary for it to hold the 61-cent rate as a maximum from said intermediate points to Wichita, thus giving rise to lower rates from said points than the Commission has prescribed as reasonable maxima for the same distances between points covered by its orders, and thereby creating a violation of § 3, which forbids undue preference and prejudice.

The ninth and last map, Exhibit AR-9, differs somewhat from the preceding exhibits in that it relates to rates which, although not directly within the scope of the issues raised in the consolidated cases and hence not directly subject to the Commission's rate order, nevertheless create a fourth-section complication. While the Commission had no active jurisdiction to prescribe a rate from Amarillo to Oklahoma City, the situation depicted on the map, it did have jurisdiction over the rates to Oklahoma City from points in differential territory and northeastern New Mexico, beyond Amarillo, with the consequence that the rates which appellants by the Commission's assailed order were compelled to establish from points west of Amarillo to Oklahoma City are lower than the rate from Amarillo that was in effect when such order was made. To illustrate, for the distance of 274.3 miles from Amarillo to Oklahoma City the rate based on the 1924 prescribed scale was 42 cents per 100 pounds, but from a point in differential territory 25 miles, say, west of Amarillo the rate recently prescribed is only 37 cents per 100 pounds.

Obviously without fourth section relief the lower rate from any point beyond Amarillo in differential territory can not be exceeded from Amarillo and other intermediate points, besides which the reduced rate thus brought about from Amarillo to Oklahoma City could not be exceeded at intermediate points on indirect routes,

such as that of the Fort Worth & Denver City and St. Louis-San Francisco shown in red on the map. For the reasons recited, in the absence of fourth-section relief the carriers to all practical purposes would be compelled to apply the reduced rates between points not within the scope of the Commission's assailed order, and to illustrate the situation so brought about we have shown on Exhibit AR-9 what the result would be if the reduced rates prescribed in 1933 were made applicable from Amarillo to Oklahoma City.

With all these facts before it, the Commission, as has been shown, has prescribed rates with which the carriers can not possibly comply unless they sue for and obtain from the Commission the relief from the provisions of the fourth section which it is authorized to grant, but which, except as a temporary measure, it has withheld.

Now the Commission has itself held, "It is well settled that we may not approve rates, the result of which is to create a violation of the law." I. & S. Docket No. 3815, *Asphalt in Central Territory*, 197 I. C. C. 481. For stronger reason it follows that, if the Commission has not power to *approve* rates which create a violation of the law, it has not the power to prescribe rates which *create* a violation of the law. This is fundamental. We refer, however, to *Galveston Chamber of Commerce* v. *Railroad Commission of Texas*, 137 S. W. 737, l. c. 745

(reversed on other grounds in 105 Tex. 101), in which one of the Courts of Civil Appeals of Texas said:

> "Our construction of this statute [a statute of the State of Texas defining the powers of the Railroad Commission of that State] is that, in saying that the railroads must charge the rates fixed by the Commission, until the same are set aside in a direct action brought for that purpose, and in also saying that the railroads shall not charge rates which are unjustly discriminatory, it means that the Commission shall not make rates which amount to unjust discrimination, as that term is defined in the statute, and that if it does so such rates are subject to be set aside by the courts, in an action brought for that purpose. Subdivision 3 of article 4574 makes a less charge for a longer than for a shorter haul prima facie unjust discrimination, but provides that the Commission may allow such charge, 'provided that no manifest injustice shall be imposed upon any citizen at intermediate points'; but the Commission is nowhere in the statute empowered to allow unjust discrimination in rates prescribed by them, as that term is defined in the first part of said article, or in subdivision 1 thereof."

For the rest, we think it is sufficient to refer the Court to the cases already cited, and especially *United States* v. *Missouri Pacific Railroad* (commonly known as the *Subiaco case)*, 278 U. S. 269, and *Great Northern Railway* v. *Delmar Co.*, 283 U. S. 686. In the latter case was involved the construction of a tariff in which

optional routes were provided, via one of which a violation of § 4 existed and via the other it did not. The Court decided that under these circumstances a shipper was not given the option between the two routes at the through rate, saying (page 691): "This conclusion is in accord with the principle that, where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law," citing authorities.

While the *Delmar case* related to the proper construction to be given a tariff, the same legal principle is applicable to a construction of a statute. Accordingly, when it undertakes to fix rates under § 1 it is obligatory for the Commission to conform the rates so fixed to the other provisions of the staute so that the rates prescribed will not contravene *any* provision of the law. In short, the requirements of the statute apply to the Commission when it assumes the rôle of rate-maker to the same extent that they do to the carriers in respect of rates initiated by them, and in like manner.

But it may be argued that the Commission in its report gave the defendants leave to file application for such relief as they might require. An answer is that whatever right to apply for such relief existed is conferred by the statute and, while the burden properly rests upon the carriers to apply for and justify fourth-section relief that is needed in the case of rates initiated

by them, this is not the case when the rates are prescribed *by the Commission itself*. Then the shoe is on the other foot, and to require *the carriers* to assume the burden of obtaining such relief is to impose on them an obligation not warranted under the law.

So also the temporary fourth-section relief granted by the Commission in the altogether informal application of the carriers (Appellees' Exhibit A, R. 1117-24) has not rendered the questions here presented moot. Only temporary relief has been granted (Exhibit YY, R. 1090-91). The temporary order is in force only "until the effective date of the order to be entered pursuant to a report in fourth section applications Nos. 15445 (amended) and 15473," and the carriers must yet, according to the Commission's views, bear the burden and concomitant expense which they lawfully would be required to bear had they themselves initiated rates not in conformity with the fourth section.

The burden of making and proving such an application is not a light one. Under the statute the Commission may not permit the establishment of any charge to or from a more distance point that is not reasonably compensatory for the service performed. Under the Rules of Practice of the Commission (Exhibit ZZ, Rule XVIII, R. 1091-93), the applicant for relief is required to give under oath a complete and accurate statement of the grounds relied upon in justification of the relief prayed.

That would involve a representation that the rates prescribed, though less than prescribed by the Commission to intermediate points, are reasonably compensatory for the actual service to be performed via through routes whose distance is greater than the rate-making distance, but here we are attacking the rates of the Commission on the very ground that they are not reasonably compensatory, although we have not undertaken to claim that they are actually confiscatory. A hearing will be had on the demand of any party who may conceive himself to be interested or by the Commission on its own motion and the following must be proved (Exhibit ZZ, R. 1091-93):

> "That the lower rates for longer than shorter hauls over the same line or route are reasonably compensatory.
>
> "A statement of rates at representative intermediate points at which rates exceed or would exceed the rates at competitive points, including rates at the highest and lowest rated intermediate points and the distances to and from all of the said intermediate points, together with a statement of ton-mile, car-mile, and per-car earnings under the rates to and from such representative intermediate points.
>
> "That the higher rates for the shorter than for the longer hauls over the same line or route are reasonable."

If it be argued that the Commission by prescribing maximum reasonable rates under the mileage scale in-

tended or that the effect of its order was to grant relief from the provisions of the fourth section, a sufficient answer is that it, under its own statement that fourth-section relief "may be applied for," has negatived the first supposition, and that the decision of the Supreme Court in *Western Papermakers Chemical Co.* v. *United States*, 271 U. S. 268, disposes of the other. It is true that in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U. S. 178, l. c. 187, it was said:

> "It may be doubted whether application by the carrier is a prerequisite to the granting of relief. As was said in *Intermountain Rate Cases*, 234 U. S. 476, 485, § 4 vests in the Commission the 'primary instead of a reviewing function' to determine the propriety of a lesser rate for a longer distance; and § 13 declares that the Commission 'shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money'."

The Commission, nevertheless, resolutely insists on written and verified applications for fourth-section relief in cases where it is the sole rate-maker.

In the *Western Papermakers case* the Commission had prescribed rates for the transportation of resin from New Orleans to Chicago, to Milwaukee, and other

points. Certain long routes, which were seldom used, though open, passed through higher-rated points en route to some taking lower rates. A fourth-section application was filed, heard and denied, but the Commission directed that the long and little-used routes should be abandoned. It was held that this last order was within the power of the Commission and that it so cured the defect in its former order. In this connection, it is proper to observe that the order of the Commission in the *Western Paper-makers case* was not attacked on the grounds which are here presented to this Court.

Surely, if it is within the power of the Commission to dispense with the use of the longer routes which give rise to violations of the fourth section, it not only is within its power but it becomes the duty of the Commission to provide in connection with rates *prescribed by it* and along therewith whatever relief from the provisions of the fourth section is necessary to make the rates thus prescribed effective via the routes over which the Commission directs that they shall be applied.

The proposition which appellants are here seeking to establish is not one that relates to the administrative discretion of the Commission but is strictly a question of the proper construction to be given the meaning of a statute. Where that is the only issue before the courts it has repeatedly been held that the latter will arrive at their own interpretation of the law, unhampered by any construction placed thereon by administrative boards

and agencies, except to the extent that in case of ambiguity in the statute consideration will be given to a long continued administrative application. Quite recently, the courts have overturned in a number of instances the interpretation that has been placed by the Commission upon various provisions of the statute, among which we cite the following as illustrative: *United States* v. *Missouri P. R. R. Co.*, 278 U. S. 269; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461; *Ann Arbor Ry. Co.* v. *United States*, 281 U. S. 658; *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686; *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370; *Texas & P. Ry. Co.* v. *United States*, 289 U. S. 627; *Chicago I. & L. Ry. Co.* v. *International Milling Co.*, 43 Fed. (2d) 627 (writ of certiorari denied, 282 U. S. 885).

Conclusion and Prayer

Wherefore, since the orders of the Interstate Commerce Commission assailed herein and the findings and conclusions upon which they were based transcend the power and authority reposed in that body, in many particulars are contrary to, are unsupported by, are without due regard for the evidence and in derogation of the transportation standard, and are otherwise without adequate legal support, appellants submit in conclusion that it devolves upon this Court to set aside the decree of dismissal entered by the court below and thereupon to remand the cause to that court with in-

structions that it enjoin, set aside, annul, and suspend such orders, and each of them, in accordance with the prayer of the Amended Bill of Complaint, which is hereby brought forward and renewed.

Irrespective of what disposition the Court shall make of Points I to XIV, appellants earnestly urge that in any event a ruling be handed down on the issues presented in Point XV. Should it be held that they have no present ground for complaint by reason of the grant of temporary fourth-section relief *(cf. United States* v. *Illinois Central R. R. Co.*, 291 U. S. 457), appellants further pray that the Court explicitly hold that they shall not be precluded from renewing their complaint on that score if at any future date the Commission shall vacate or withdraw its temporary grant of fourth-section relief or else shall call upon them to assume the burden and expense of presenting evidence to support a prospective superseding order granting permanent relief from the provisions of § 4.

Respectfully submitted,

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APPENDIX

Conformably to paragraph 1 (f) of Rule 27 the following portions of the Fifth Amendment to the Constitution of the United States and of the Interstate Commerce Act (49 U. S. C.) are submitted as being material to the issues under review.

Article V, U. S. Constitution:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * (Germane to Point XV, *supra.*)

Section 1 (5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *

Section 3 (1):

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or

locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 4 (1):

That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail route or line is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from

intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; * * *

Section 14 (1):

That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Section 15 (1):

That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act; or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or other-

wise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15 (3):

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges

applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; • • •

Section 15 (4):

In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: • • •

Section 15a (2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.